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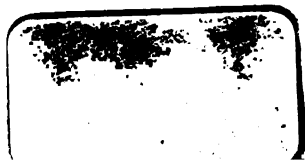




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THE  
JOURNAL OF JURISPRUDENCE,

1860.

VOL. IV.

EDINBURGH:  
T. & T. CLARK, LAW BOOKSELLERS, GEORGE STREET.  
GLASGOW: SMITH AND SON. ABERDEEN: WYLLIE AND SON.  
LONDON: STEVENS AND SONS.

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MDCCCLX.



MURRAY AND GIBB, PRINTERS, EDINBURGH.



*Vol. IV. No. 1.*

THE  
JOURNAL OF JURISPRUDENCE.

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THE BUSINESS OF THE COURT OF SESSION.

AFTER the Commons House of Parliament, the Court of Session is certainly the best abused institution in the kingdom. Everybody that professes to know anything about it, insists that there is something wrong; and the severest critics of the existing system are those of the class most interested in its preservation. For our lawyers are, as Lord Brougham has testified, men of large and liberal ideas, friends to Law Reform, with a decided propensity for self-immolation on the altar of public duty. It would be idle to protest against the prevalence of such an amiable weakness amongst some of our professional brethren; and we only advert to it as illustrative of that diversity in matters of taste, which has become proverbial. We are content to fall in with the humour of the time. A legal functionary, of dramatic celebrity, begged that somebody would have the goodness to write him down an ass. To oblige the members of the College of Justice, we are resolved, at whatever sacrifice of personal feeling, to "write down" that venerated incorporation.

The business of the Court, it is said, has diminished, is diminishing, and ought to be increased. This inversion of the famed historical protest does not, however, exactly represent the grievance of which we have to complain. In one view, the business might even be supposed to be increasing. For example, the Rolls of the last Summer Session show that a larger number of Reclaiming Notes were presented during that term than in any corresponding period since the establishment of the Inner House on its present footing. During the current Winter Session, at least 70 Reclaiming Notes

and litigated causes have already been enrolled in the First Division alone; and although their Lordships have been working at the "irons" like British tars in a leaky vessel, the influx of business in any given interval of time, is equal to all that the united energies of the Court can succeed in clearing away in the same period. But this overflow of Inner House cases is, we are told, the certain har-binger of ruin to the business of the profession. The augmented number of Reclaiming Notes is simply an indication that more than the usual number of cases have been decided in the Outer House. This again arises from the circumstance, that the Lords Ordinary have had few new Records to prepare, and have thus been enabled to devote a large share of their time to the Debate Rolls. Finally, the scanty supply of new cases is said to be attributable to the length of the Inner House Rolls. So the argument proceeds, in a vicious circle, each grievance being at once the cause and the consequence of all the rest.

With regard to the alleged diminution in the business of the Court of Session, we shall say nothing, as we do not know where to find materials for arriving at a correct opinion. A comparison of the "Printed Rolls" for the last two years would, for obvious reasons, afford only the rudest approximation to the truth. Meanwhile, the profession has been startled by the announcement, that a leading junior has been compelled, by pressure of civil practice, to resign the lucrative office of advocate-depute. It was rumoured some few months since, that one of the best Sheriffships in Scotland would probably be vacated, in consequence of the learned judge being unable to overtake the combined duties of Sheriff and leading counsel; nor is there any visible relaxation of the labours of others who are fortunate enough to have secured a prominent position in the forensic arena. If diminution there has been, we should be inclined to attribute it to an unfounded prejudice against the Court of Session, rather than to any real superiority in the Sheriff Courts, either as regards efficiency or celerity. In a comparative question, it would not be fair to call the Court of Session a dilatory Court; and with the prospect of an advocacy before him, the Sheriff Court is about the last tribunal a suitor would choose for the adjudication of any matter requiring despatch.

The state of the Inner House Rolls is, however, a different and a more serious question; for, whether logically demonstrable or not, certain it is that the Rolls of the First Division have arrived at the

position of being permanently twelve months in arrear. Of course there are fluctuations. At present the tendency is, as we have hinted, towards reduction; the Court having in fact already heard and determined the causes enrolled the first week after the last January sittings. This yearly arrear is a debt inherited from a very remote period; and experience has proved the utter futility and hopelessness of all attempts at reducing it, based on adherence to the existing system. The operations of the Chancellor of the Exchequer, when, at the close of a successful financial year, he transfers half a million to the account of the Commissioners for the National Debt, is a fair parallel to the arithmetical transformations that take place in the Rolls of the First Division.

The plan of a Third Division, formerly suggested in this Journal, has been much canvassed of late; and so far as we can learn, public opinion, both in and out of the profession, is favourable to the scheme. The only substantial objection is, that it would do away with the permanent Lords Ordinary; but this difficulty would be obviated by enabling one Judge from each Division to sit at Chambers (as in the English Courts), or in the Outer House, for the preparation of records and hearing of motions. This merely formal business could easily be got over before eleven o'clock; and the question would then remain, whether it were more advisable to have all debates heard in the first instance before the four Judges, or to continue the present system of a rehearsal (for it is nothing more) before a Judge in the Outer House; in which case the number of Judges for each of the three Divisions would be reduced to three. For our part, we have never happened to meet with any one who has been able to discover the slightest utility in the Outer House system. The Lord Ordinary's decision is invariably taken to review at all competent stages; *finality* is an idea as completely out of date in the Parliament House as it is in political circles. How completely an Outer House judgment is considered to be a matter of form, is obvious from a practice notoriously on the increase amongst leading seniors, of systematically absenting themselves from the Outer House bars. If there is room for a great display, or if the bar is vacant after eleven, and no chance of an Inner House debate coming on, these magnates may perhaps be induced to tender their assistance to the Lord Ordinary. But as for coming up at nine—really, there is no use for it. It's only retarding the business of the Court; and after all, the battle must be lost or won in the Division.

Is it necessary, however, to go on in the present routine until Parliament can be induced to sanction so important a change in the constitution of the Court as that which we have suggested? We apprehend not. There are at least three ways and means of gaining additional time in the Divisions; and each and all of these means are within the powers of the Court itself.

(1.) One very obvious resource is that of transferring more causes to the Second Division Roll. We are aware that their Lordships of the Second Division will have considerable difficulty in preventing the accumulation of arrears in their own Court. But even if they should be unable for the future to reduce the roll of arrears handed over to them by a single case, it would at least be a gain to the suitor to have *only six months* to wait for a decision instead of twelve—an indirect effect of the transference which, we venture to hope, will not be overlooked by those who have the management of this matter.

(2.) The meeting of the Court might be fixed for ten o'clock. The present hour of assembling is regulated by the 71st section of the Act of Sederunt, 11th July 1828; and it was altered to eleven in order, as is stated, "to give more time for counsel to attend the Lords Ordinary, in preparing causes in the Outer House." We scarcely think that even the firmest supporters of the present system will say that the object of this enactment has been attained; since, in point of fact, those counsel whose services are most in demand for Inner House practice are more likely to be found at the Ordinary's bar *after* eleven than before it. On the other hand, the attendance at so early an hour as nine o'clock is felt to be irksome by all parties; and to junior practising advocates, who cannot afford to shirk Outer House duty, the hardship is great of being compelled to sit out two sets of Judges. Very little business is actually transacted before ten o'clock; and we cannot see that any serious inconvenience would result from causing both the Outer and Inner House Courts to meet at ten. Even if the number of hours devoted to the business of the latter were no greater than at present, we are satisfied that more business would be got through by meeting earlier in the day, when counsel were not exhausted by a long attendance.

(3.) The last and the most effectual method of curtailing the rolls is by holding extra sittings in vacation. At a time when a seat on the bench of the Second Division was almost a sinecure, we need not wonder if the Judges of the First showed a reluctance

to tax their holidays for the benefit of their less popular brethren. Now that both Divisions can be obliged to pull fair, there is really no excuse for neglecting the duty intended by Parliament to be imposed, of sitting till all arrears are cleared off. The words of the statute (2 and 3 Vict., c. 36., sec. 10) are very positive and precise:—"It shall be lawful for the said Court of Session, and they are hereby authorised and empowered, *if there shall be arrear of business* in the said Court, or as the state of business otherwise may require," to extend the sittings to any period not exceeding two months in each year. A fortnight in spring, and six weeks off the long vacation, would still leave an abundance of time for relaxation. When it is considered that the Act which contains this injunction also provides for increasing the salaries of the Judges from L.2000 to L.3000, it must be allowed that those learned personages have received a handsome equivalent for this new duty, which they have hitherto failed to perform. It must not be supposed, however, that the matter is left entirely in the option of the Judges. Everybody now-a-days is calling upon the Lord Advocate to introduce a bill for extending the sessions, though the Advocate has already obtained from Parliament all the authority requisite for that purpose. Lord Rutherford, the author of the enactment in question, himself constitutionally indolent, had the acuteness to perceive that in matters of this sort Judges were but fallible men, and accordingly the next section was made to provide an effectual remedy:—

Sect. 11. "It shall be lawful for Her Majesty, Her Heirs, and Successors, with the consent of Her Privy Council, from time to time to order and direct the Extension of the Duration of the Sittings of the said Court, or either of the Divisions thereof, or all or any of the Lords Ordinary, and to alter and limit such Extension to such and the like Duration, and in such and the like manner, as the Judges of the said Court are herein-before authorised to alter the Sittings thereof."

Here is a remedy made to our hand. Nobody can doubt that it is the duty of the Court to hold extra sittings, as is done in England every term. Let the Court exercise the necessary self-denial, and make a merit of working off these arrears. If not, we call upon the Government, by an Order in Council, to make the sittings of the Court commensurate with the business of the country.



## THE TOBERMORY SEQUESTRATION.

THE recent decision of the Second Division of the Court in the notorious case of *Joel v. Gill* (pronounced on the 23d of November last), will hardly tend to reassure the minds of English creditors, already sufficiently disquieted by the course pursued last June in reversing Lord Kinloch's first interlocutor. It will be remembered that, at the advising in summer, the Second Division unanimously held, that when an Englishman by birth, residence, and profession, comes to Scotland for the avowed purpose of taking advantage of the Scotch Bankruptcy Law, he may, by forty days' residence in Scotland, become "subject to the jurisdiction of the Supreme Court" of that country, and thus be enabled to obtain a sequestration. The possible inexpediency of a rule by which an insolvent is allowed to choose his own *forum*, and thus to subject his creditors to the Court of his selection, perhaps securing to himself immunities and privileges which he might not otherwise have obtained, was fully admitted by the Court; but they held that they were bound to follow the injunctions of the statute, and to disregard all considerations of equity and expediency. "Subject to the jurisdiction of the Supreme Court of Scotland" must (according to this decision) simply mean subject to it for the time; the true foundation of civil jurisdiction *in personam* is domicile, and domicile, in this sense, just means residence for the time. The term of residence sufficient to confer jurisdiction is fixed by the law of each country as a matter of practice; in Scotland it has been fixed at forty days: hence it is argued, a residence in Scotland for forty days is sufficient to entitle an Englishman to obtain a sequestration.

The interlocutor of November is a legitimate corollary from the principle laid down of a *rigid construction* of the statutory requirements. We must premise, that after the question of jurisdiction had been settled, the case went back to the Outer House, that parties might be heard on the other grounds for recalling the sequestration. The argument maintained on behalf of the petitioner for recall (Mr Joel) was that the designation of the bankrupt was in itself so inaccurate, defective, and insufficient, as to come short of the requisites of the Act. The Lord Ordinary (Jerviswoode) held, that while it was important in a petition for sequestration that a sufficient designation should be given, it was not less important that a sequestration should not be recalled on slight grounds. The designation complained of was "William Gill, sometime residing at Park Villas, Richmond, in the county of Surrey, and lately residing at Tobermory, in the Island of Mull." To this it was objected, that there ought to have been a statement that he was a barrister-at-law, and had a house at Bayswater. The Lord Ordinary, on the whole, considered that, in the absence of any express enactment on the point, the imperfection in the designation of the bankrupt was not

of so flagrant a character as to warrant the recall of the sequestration.

The interlocutor of Lord Jerviswoode has been affirmed by a majority of the Court, consisting of the Lord Justice-Clerk and Lord Cowan. Lord Benholme dissented, and Lord Wood was absent. The most striking feature in the opinions of the majority is the strictness of the doctrine laid down by the Lord Justice-Clerk on the subject of designation. His Lordship holds that the proper designation of any man is a statement of his present occupation and residence; that if he has no occupation, his present residence only is required; that the fitness of the designation does not depend upon the length of time during which it may have applied to the person designed; and that although, in such cases, it may be reasonable for a party coming from another place to state his former residence and former profession, this is not on proper legal principles a part of his designation at all, but is rather a history of the individual. Tried by this standard, the designation in question is redundant to a fault. It would have been enough had it simply consisted of the words, "William Gill, residing at Tobermory."

So far, then, it appears that what we shall call the orthodox designation of a bankrupt may be simply nugatory; for it is conceded that the addition, "residing at Tobermory" does not strengthen the presumption (whatever *that* may be) arising from the insertion in Her Majesty's Gazette of a notice, to which is prefixed in small capitals the patronymic of "Gill." But it seems it is not enough for the President of the Second Division that the notice shall withhold information from the creditor; it is necessary that it should positively mislead him. Aiming still at an ideal standard of excellence and nobly regardless of the consequences, the Lord Justice-Clerk suggests to fraudulent bankrupts an extremely ingenious mode of concealing their identity, by which creditors may be put utterly at fault, and detection rendered impossible. All that Mr William Gill (or it may be, William Brown) is required to do, is to buy, on his arrival in Mull, "a few pounds of tea and sugar." If he trades with these during his forty days' residence in the island, he may, fortified with the opinion of the second personage in Scotland, present a petition for sequestration, designing himself "William Brown, grocer in Tobermory." With such a designation, and with such backing, he may defy all the creditors in the kingdom.

Among the eccentricities of judicial opinion that have lately come under our notice, this "tea and sugar" theory is decidedly the most entertaining. Scotchmen (unless there are any imprudent enough to lend their money, on personal security, to members of the English bar) can afford to smile at this whimsical proposal, which ought certainly to find a place in any new edition of the play of "Used Up." Charles Matthews, as "The Grocer of Tobermory," would be sure to draw crowds at the Adelphi; and we do not think the public will ever appreciate the Justice's saccharine hypothesis,

until it is brought before them in two acts, and under the patronage of that distinguished comedian.

It is not surprising that this new mode of whitewashing should be held in especial favour amongst "gentlemen in embarrassed circumstances." A similar case was lately brought before the First Division, in which the bankrupt had taken a still more effectual means of preventing unpleasant opposition, by procuring an interlocutor appointing intimation to be made in the *London Gazette* on the day immediately preceding the one fixed for the first meeting of his creditors. This was really too absurd; and, accordingly, his counsel did not oppose the recall of the interlocutor. In this case (Seq. of *Edward Fox*) Lord Ivory expressed his regret that the Second Division had not consulted the other Judges with reference to the decision of the Tobermory case. The state of the law in this particular has also, we observe, elicited some severe observations from Baron Martin, at the Liverpool Assizes. English and Scotch creditors are equally liable to be outwitted. Say that Thomas Smith, stockbroker in Glasgow, falls into difficulties; if he can only succeed in escaping untraced to some remote locality, where bankrupt examinations are not reported, his creditors are not very likely (unless with the aid of clairvoyance) to discover that their Thomas is the same who figures in the *Gazette* as "Thomas Smith, fish-dealer at Wick," or, it may be, "Thomas Smith, pedlar, residing at Kirkwall." With all respect to the opinion of the Lord Justice-Clerk, we cannot but think that there is much weight in the argument of Lord Benholme:—"When I seek to know what a designation ought to be, I look at the purpose of it. A designation is required for various purposes in law; the designation sufficient in one case may not be sufficient in another. Thus, in a criminal case, the designation of a witness must be such as to enable the accused to find him; in a deed, the profession of the witness is of importance. A designation depends upon the object the law has in view in requiring it. It must be such as to convey information to the parties to whom it is intended to do so. The object of the statute in requiring a designation in a petition for sequestration, is not to enable a creditor, after a long inquiry, to find out his debtor, but to call his attention at once; and if there are things which would attract his attention, the suppression of them deceives the creditors."

We cannot help thinking that this is the more rational view of the question. A designation in which the leading features of a man's life, his chief occupation, and ordinary place of abode, are omitted, and nothing is given but the locality of the inn or lodgings in which he is hiding in some outlying village—or where, as the Lord Justice-Clerk suggests, he is described by the name of some trade which he has adopted, in reality for purposes of deception—is, we confidently submit, a false designation, inasmuch as it includes, if not a direct falsehood, at any rate a *suppressio veri*. In the

recent English case of *Perrins v. the Marine and General Travellers' Insurance Company* (11 Nov. 1859), where it was held, by a majority of the Court of Queen's Bench, that an ironmonger in Birmingham had not forfeited a policy by describing himself in the proposals for insurance as "Esquire of Saltley Hall," Chief Justice Cockburn held that that description was false, inasmuch as there was a suppression of the truth; and the opinion even of the majority was based on the fact that, in the case under consideration, the concealment was in a matter quite immaterial. We need hardly remark that the concealment, in a petition for sequestration, of the petitioner's real occupation and lifelong residence, is a concealment in a matter very material indeed. The whole question is, whether the commands of the statute are fulfilled by the use of a colourable designation apparently true, but in reality a sham and a lie.

Since, however, this interpretation of the statute has now been fixed as the law, the next question is, How is this flagrant evil to be remedied? If the true meaning of the Act is what it has been held to be, the statute is obviously defective, and must be altered. It seems as if the Lord Justice-Clerk, in laying down the law so very broadly, and almost going out of his way to make matters worse, was endeavouring to show the necessity that exists for an amendment of the Act. This amendment should be effected on two points. In the first place, insolvents should be made to take the benefit of the law within the jurisdiction where reside the majority of their creditors in number and value. In the second place, in justice to creditors, Scotch as well as English, it should be enacted, that when a bankrupt petitions for sequestration, he is to state in his designation the profession and residence by which he is generally and best known. The designation, in fact, ought to be that under which he has incurred the debts, from which, through the sequestration, he seeks to get himself absolved.

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#### ADVOCATIONS—VALUE.

IN the twentieth year of the reign of George II., it was enacted that "advocations in causes not exceeding the value of L.12 sterling" should no longer be competent. The question thus raised, How is the value of a cause to be ascertained? has perplexed lawyers from that day to this. The Sheriff Court Act, 16 & 17 Vict., c. 80, in providing that it shall not be competent to remove from a Sheriff Court, or bring under review of the Court of Session, "any cause not exceeding the value of twenty-five pounds sterling," has left the question precisely where it found it. The solution of the problem has been reserved for time and the Court of Session. The wonder is, how the former should have done so little, and left so many points to be settled by the latter in recent years. Such questions as the

following have been raised—though not for the first time—and with difficulty settled, within the last year or two. Is the summons or the Sheriff's decree to be taken as the test of value? Is the sum claimed, or the sum disputed, to be considered? Is interest to be taken into account? Are expenses?

In the present article it is proposed, 1st, To state the principles which seem to have been at last settled; and 2d, To show how these principles have been applied in various recent cases.

1. The general principle is, that the Supreme Courts have jurisdiction where it is not expressly excluded.

2. From this principle it follows that any cause may be advocated *unless it is clear* that the value does not exceed L.25.

3. In determining the value of a cause, the nature and extent of the demand made in the summons is the test.

4. Expenses of process are not to be taken into account in estimating the value of a cause.

These principles were recognised and applied in the following cases :—

In *Hopkirk v. Wilson*, 21 Dec. 1855 (18 D. 299), it was decided that expenses of process are to be excluded from consideration in judging of the value of an action. This decision proceeded on the ground that expenses are extrinsic and incidental, and form no part of the subject-matter of the action. It does not therefore affect the question, whether they are concluded for in the summons or not.

In the case *Mitchell v. Murray*, 10 March 1855 (17 D. 682), the summons concluded for the sum of L.22, 3s. 6d. (deducting therefrom L.3 paid to account), with the legal interest since the same became due, and in time coming till payment. On the 12 May 1854, the Sheriff decreed for the balance of L.18, 1s., with legal interest thereof from 10 May 1836—these together amounting to upwards of L.30. The defender brought an advocacy, and the pursuers objected to its competency. The Court was divided in opinion, but the majority of the judges held that the advocacy was competent. Several of those in the majority based their opinion on the view that the value of the cause was to be judged of by the Sheriff's decerniture, while those who dissented did so on the ground that the summons was to be looked to only. The view held by the remaining judges who voted in the majority, is that which may now be considered to be the sound one. It is very distinctly laid down by Lord Ivory in the subsequent case of *Wilson v. Wallace and Connell* (6 March 1858, 20 D. 764). His Lordship said, "Now the two cases of *Mitchell v. Murray* and *Hopkirk v. Wilson* are perfectly reconcilable with each other, and with the case of *Robertson*. The principle on which they are so is subtle, but quite consistent with itself. It is this, that the conclusions of the action are the measure of the competency of advocacy, but that these conclusions include prospective claims just as much as the present claim for the debt concluded for. Thus, where an action concludes for L.25, it is incompetent to advo-



cate it, because the value does not exceed L.25, and the incompetency remains, whatever may afterwards accrue in the shape of interest ; for if that interest is not included in the conclusions of the original action, a separate and supplementary action must be raised to entitle the party to recover it. But if the conclusions of the original action be not exclusively confined to L.25, but comprehend also interest, be it only from the date of citation, then the nature of that conclusion is such that advocacy shall be competent, because it is not a conclusion limited to L.25. It is a conclusion for a sum of L.25, to which, if a farthing be added, the rubicon is passed. There must be something more than L.25, if the conclusion is given effect to, however trifling. Just as in the case of an action brought for the aliment of a natural child, all that is presently due may be perhaps only two years' aliment of L.9. But if the action is brought not only for these past arrears, but for future aliment, as it shall become due, decree after decree may be obtained for that future aliment ; and so, where a debt payable by instalments is concluded for, or feu-duties, or rent, the term of payment being first come and bygone, the value of the cause comprehended under these conclusions is larger in all such cases than the actual money value for which the action was brought, inasmuch as the conclusions include, over and above that present payment, something prospective ; and the same principle which fixes the first term's liability, necessarily fixes all future terms of liability, and therefore the action is held to be not for the one term's payment, but for the whole. Therefore, where the conclusions include interest, that is to be estimated in determining the competency of the advocacy."

The decision in *Wilson v. Wallace and Connell* was in harmony with these principles. The peculiarity of that case was this, that the defenders in the action at once admitted their liability for L.26, and, before any of that procedure upon which the judgment of the Sheriff came ultimately to be pronounced, they consigned and the pursuer uplifted that L.26, leaving L.5, 4s. 3d. as the one subject-matter in dispute between the parties. The Court held that the value of the cause was to be judged of by the conclusions of the summons, and that the advocacy was competent. Lord Curriehill dissented from this view and from the judgment. The equity of the rule so settled is well shown by the Lord President in a single sentence : "Parties had joined issue in a cause which might competently be submitted to the Supreme Court eventually, and the defender could not, by paying a portion of the sum concluded for, deprive the pursuer of the right—which he had from the nature of the cause itself—of getting the judgment of the Supreme Court upon it."

This principle was still more strikingly illustrated in the case of *Robertson v. Wilson*, 3 March 1857, where a process of interdict was allowed to be advocated long after the question at issue had been settled, and the sole remaining interest was the right to expenses.

In the case *Inglis v. Smith*, 17 May 1859, 21 D. 461, the conclusion in the summons was that the defenders ought to be decerned to pay to the pursuer the sum of L.92, 2s., which sum it states that the defenders have failed to pay, "but deducting always from said sum of L.92, 2s. the sum of L.57, 19s. 11½d., being the amount of an account for clothes purchased by the pursuer from the defenders on or about the 4th day of April 1856, conform to account and statement annexed hereto, leaving a balance due to the pursuer of L.34, 2s. 0½d. sterling, which is hereby restricted to the sum of L.25, with expenses. The pursuer, in objecting to an advocacy, maintained that, having given credit for the sum of L.57, 19s. 11½d., he was only entitled to sue for the balance due, and that all that was at issue between the parties was that balance which was restricted to L.25. The Lord Justice-Clerk observed: "A Sheriff Court cause *may be of very great value* and importance, although no sum whatever is concluded for, or *though the sum concluded for be of trifling amount*. The true point, therefore, to be considered is, what is the interest which the parties have in the cause; in other words, what difference will it make to them how the cause is decided? Adopting that view of the construction of the statute, this can present no difficulty. It is impossible to read the conclusions without perceiving that the effect of a decree in favour of the pursuer, in the terms in which it is sought, would be to extinguish a debt due by him of L.57, 19s. 11½d., and also to give him a decree for L.25; and therefore it is plain that the value of the cause is L.25, *plus* L.57, 19s. 11½d."

It appears to be still an open question whether an action *ad factum præstandum* can be advocated when the value is obviously under L.25. If the value is doubtful, it is clear that it may be advocated. In *Cameron v. Smith* (24 Feb. 1857, 19 D. 517), the pursuer, the seller of two cows, raised an action against the defender, who had got possession of them from the buyer, concluding to have him "ordained to re-deliver to the pursuer, in the like good order and condition as when they were removed, two cows, the property of the pursuer; or otherwise to make payment to the pursuer of the sum of L.15, 6s. sterling, being the price of the said cows, with the legal interest thereof." The Sheriff decerned against the defenders for the sum of L.15, 6s. The pursuer objected to the competency of an advocacy brought by the defender. On the case coming before the Inner House, the late Lord Justice-Clerk (Hope) observed: "If the defender incurred any liability to the pursuer, he became liable for the price of these cattle and nothing more. The conclusion, therefore, for delivery of the cattle was not the real and substantial conclusion. The conclusion for money is the real ground of action, and it is not to be overcome, or its consequences overruled, by throwing in an alternative conclusion for delivery of the subjects."

"I wish to reserve, as not arising in this case, my opinion on the

question, whether, where decree is given for delivery only, advocacy might not be competent. But, also, I will not say that because the petitioner's conclusion is for a small sum of money, the conclusion *ad factum præstandum*, where there is a particular object in acquiring the *ipsissima corpora* of what is claimed, may be barred from advocacy because only a small sum of money is claimed." Lord Cowan, who concurred, also reserved his opinion upon this point. His Lordship observed that in the present case the only question was, Did the summons fix the value of the cows?

The case *Cooper v. Bow* (18 Dec. 1823, 2 Sh. p. 511, New Edit.) affords another instance of a summons containing an alternative conclusion, viz., for delivery of two queys, or payment of a sum of money under L.12. In this case, however, the Sheriff's judgment was for delivery, and the advocacy was held to be competent. It is to be observed that here the pursuer was a purchaser, having right to delivery. Lord Cringletie observed in his note as Ordinary in the case: "Had the decree been for a sum of money under L.12, the incompetency would have been evident; but it is to restore two queys, the value of which is not proved, and may exceed L.12."

A process of interdict may be advocated, in respect that its money value is indefinite. This was decided in *Robertson v. Wilson* (3 March 1857, 19 D. 594). See also the observations of the Lord President in *Wilson v. Wallace and Connell*, already referred to.

These cases may suffice to show that the principles above set forth have been settled, and to some extent how they are applied.

## NOTES IN THE INNER HOUSE.

### FIRST DIVISION.

*Appeal, Scottish Equitable Assurance Co. in Gunn's Sequestration.*

*Appeal, M'Cubbin v. Venning.*

In these cases the question arose, Whether a judge, who is a member of the Scottish Widows' Fund, or of the Scottish Equitable Assurance Co., can be declined, where either of these bodies are parties to an action coming before him. The opinion of the whole Court was taken, and (apparently with the single exception of Lord Deas, one of the declined judges) it was in favour of sustaining the declinature. We must take leave to doubt the soundness of this opinion. It is little better than a truism, that to secure purity in the administration of justice is one of the highest objects of law and civil government. In order to this result, it has ever been the rule that no judge shall hear and decide a cause in which he is himself directly interested, or to which his near relatives are parties. But this rule suffers several exceptions—some, necessary, others so obvi-

ously expedient, that they are now fully recognised. Thus, in the last century, nearly all the judges lived themselves, or had near relatives who lived or held property, in the City parish of Edinburgh; it was therefore laid down, that no declinature on that ground should be sustained against any of their Lordships judging in questions connected with that parish or in which it had an interest. Had this exception not been made, it would have been perfectly impossible to get a quorum to settle any City parish disputes. With the present century, the judges have migrated westward, and their residences are now chiefly in the parish of St Cuthbert's. Accordingly, in *Gray v. Fowlie*, 5 March 1847, the exception recognised in regard to the parish of Edinburgh was extended to the parish of St Cuthbert's. But another class of exceptions is derived, not so much from the necessity of the case, as from the plain absurdity of giving effect to the rule. Thus, in the case of the *Bank of Scotland v. Ramsay*, 12 Dec. 1738, it was held that a judge might deliberate and vote in a cause relating to the corporation of the Bank of Scotland, of which he was a proprietor. It was ridiculous to suppose that Lord Kilkerran or Lord Royston would be so influenced by his interest in the Bank as to forget his duty as a judge. The interest was clearly so remote, that it could not lead the judge who had it into either of the two errors (one at least a crime), of showing a partiality to the party with whom he was connected, or of being unduly hostile to him so as to put down suspicion. This exception was more formally recognised by the Act of Sederunt, 1 Feb. 1820, which extended it to the case of all chartered banks in Scotland. Carrying out the principle of the exception, it has been held to apply to the case of a near relative of the judge holding shares in other chartered companies (*Spiers v. Ardrossan Canal Co.*, 27 Feb. 1823). But if this be sound law, why refuse to extend the exception to the case of all large public companies like the Scottish Widows' Fund and the Scottish Equitable Assurance Co? It is quite out of the question to suppose that, because a judge happens to have insured his life with one of these offices (even though they may be mutual assurance companies), that he is on that account the more likely to view favourably the plea stated for them in an action depending before him. And if so, it is wrong that the litigants should, for the sake of a mere whim, be deprived of the benefit of the learning and ability of a judge whom the country handsomely remunerates for placing both at the disposal of all who come before him claiming rights or resisting wrongs. The thorough emancipation of the press, and the power it now exercises on public men, has removed the foundation of many older rules devised by the wisdom of our ancestors for their protection in less settled times. This of which we have been writing is, we think, one which should pass away or be drawn within very narrow bounds. It is probably not a matter for legislation, but the Court themselves should repel all declinatures, unless founded on clear and direct personal interest in

the subject of the suit. If they refuse to do so, it may be proper that the Legislature should interpose to remove a difficulty which may, in certain contingencies, lead to a denial of justice altogether. We believe there exists in the statute book a law which prohibits the appointment of persons engaged in trade to any office in the Cabinet. If the principle is worth anything, it should go to exclude judges from holding shares in any company, public or private. Whilst on the subject of declinatures, we may just observe that it seems improper to allow a judge to decline because his brother happens to be, or to have been, mandatory for one of the parties to the action. What possible bias could that fact give to the mind of a man worthy of occupying the bench? Altogether, the grounds of declinature are at present too numerous, and, we think, would "require to be reconsidered."

*Mrs Grant or Robertson v. Grant's Trustees.*

Robert C. Grant, advocate in Aberdeen, was the only child, by a first marriage, of Charles Grant, sometime ensign in the 42d Regiment. On the 11th March 1823, Robert Grant executed a trust-disposition and settlement, by which he conveyed the estate of Balgowan, etc., which had been disposed to him by his father under a destination to "him and his heirs whomsoever," to certain trustees for charitable and religious purposes. Robert Grant died on the 23d March 1823, only twelve days after the trust-disposition was executed. He left no issue nor any collateral relations, and was consequently succeeded by his father Charles. At first Charles threatened to reduce the deed on the head of deathbed, but having made terms with the trustees, he, on 1st May 1823, executed a ratification of his son's deed. On 19th July Charles Grant served heir to his son, on 20th August he of new disposed in favour of his son's trustees, and on 30th August 1823 the trustees were infeft. So stood matters for upwards of a year. On 13th Dec. 1824 the pursuer was born, the daughter of Charles Grant by a second marriage, and the half sister of Robert Grant the disponent. Had she been born at the date of her brother's death, she would of course have been his heir. An action was raised for the purpose of reducing the trust-disposition and settlement of Robert Grant *ex capite lecti*, the ratification thereof granted by Charles Grant, and the titles made up in his person and in the persons of the trustees. The defenders *inter alia* pleaded that the deeds executed by Charles Grant, the then existing heir of Robert Grant, constituted titles in their favour sufficient to exclude the action. The Lord Ordinary (Neaves) sustained the defence of exclusive title, and the pursuers having reclaimed, the Court (Lord Curriehill dissenting) adhered. The questions raised in this case are mainly two—1. Whether a father, who serves to a son who has died intestate, acquires absolutely and indefeasibly, or under an obligation, to denude in favour of his own future children should he have any? 2. Assuming that



he does not acquire indefeasibly, is he, while the child is unborn, proprietor, having a power of disposal of the property? Both questions are very interesting in themselves, and were very ably argued in the present case. In considering the authorities and decisions with regard to the first of them, it is necessary to bear in mind the distinction between tailzied and intestate succession. The essential quality of the former is, that it depends entirely on the will of the defunct; but in legal or intestate succession, that has no place, "for there can be no presumed will where there is no will at all, seeing in the legal succession the defunct has given no indication of his mind, neither by word nor writ." The principle which regulates this branch of legal or intestate succession is *semel hæres semper hæres*; but this is overruled by the regulating principle of tailzied succession, the will of the defunct, *quæ tollit legis provisionem*. Bearing this in mind, the institutional writers and the decisions (if we except certain characteristic but rather speculative remarks of Lords Kames and Monboddo) can only be read as unanimously and consistently deciding, that when a father serves to his intestate son his right is indefeasible, and no emerging nearer heir (so called) can compel him to denude in his favour. Bankton (iii. 5, 56) and Stair (iii. 5, 50 *et seq.*) say so expressly, while Erskine (iii. 8, 76) and Bell (Principles, § 1642) indicate a similar opinion by the clearest implication: see also the cases of *Mountstuart*, 13 Nov. 1707, M. 14903, and *M'Kinnon*, M. 5279, 5290, and 6566; and the Carnock entail case, decided on the same day as the present case). To hold otherwise would be to deny that by the law of Scotland ascendants can ever *succeed*. The alternative view is, that they may take a fiduciary fee for behoof of their own unborn but possible children. On this view, as it was well observed in one of the papers, "if the father be married he can never himself learn what his rights are. These must remain unknown till he has been nine months in his grave, and till after his own succession has opened." Lord Deas also pointed out the anomalous results of such a doctrine, and its antagonism to the law's well-known dislike to fiduciary fees. If the father's right is not indefeasible, said his Lordship, he cannot with safety spend a halfpenny of the succession; he must accumulate all the rents and other proceeds in order to hand them over to a nearer heir, should such heir ever appear. We almost suspect that his Lordship has in this illustration overlooked the application of the familiar doctrine of *Fruges bonâ fide perceptæ et consumptæ*. But the argument of the other side, without pushing it to a *reductio ad absurdum*, is fraught with insuperable difficulties. Lord Curriehill, who dissented from the judgment of the Court, thought the father might sell or burden the property, but always under the condition of denuding in favour of a nearer emerging heir. With all deference, we greatly fear if such a condition did not place the subject of the succession wholly *extra commercium*, it would certainly involve the properties affected by it in utter con-

fusion. Who would buy or lend money on the security of an estate held by so precarious a tenure? If, notwithstanding, it should be sold or money should be lent upon it, what litigations would ensue if circumstances should occur to call the condition into operation. No doubt the *argumentum ab inconvenienti* is not a very powerful one in a question of feudal right or conveyancing. Still, it is not to be disregarded when, as here, it supports the views of the institutional writers and the decisions. Of course, we have assumed throughout that the father had served to his son before the appearance of a nearer heir. If he had not served, it would be a question of some difficulty whether he could afterwards do so. Upon the whole, however, having regard both to the reason of the thing and to the forms of service before and since the "Service of Heirs Act," we should be inclined to say, that if a father, succeeding to an intestate son, failed to take the steps which the law points out as necessary for vesting the property in his person, his own supervening child would be entitled to cut him out. How could one in such a position set forth in his petition for service, as required by the Act, that he is the "nearest lawful heir" of the deceased, when, in point of fact, by that time there is a nearer heir in existence? It is scarcely necessary to observe, that there is nothing inconsistent in holding that a father, before the birth of a child, may be entitled to serve and to keep possession, in virtue of his service, after a child is born, while he cannot compete with that child should he neglect to serve till after the birth.

On the second question, viz., whether, assuming that the father does not acquire indefeasibly, he is nevertheless, while the child is unborn, proprietor, having full power to dispose of the property, it is not necessary to say much. That his onerous deeds will be valid and effectual against the estate, is not, and cannot be, disputed. Even his gratuitous deeds, Lord President Dundas held, in the case of *M'Kinnon* (5 Brown's Sup. 905), "would be valid if they were not fraudulent." This is probably carrying the matter too far, and it would be difficult to hold that a gratuitous disponee from a father with a defeasible title would be in any better case than his author would have been if the right had remained in him. In the present case there could be but little doubt that the father, whether his title was defeasible or indefeasible, was entitled, there being no existing nearer heir to challenge his son's deathbed deed. If so, does not that necessarily imply that he could, at least for a valuable consideration, ratify the deathbed deed? And that again throws back light on the question of defeasible and indefeasible, strongly confirming the view that the father, once served, cannot subsequently have his right of succession taken away.

On the first question the judgment of the Court was express, that the father's right is, after his service, indefeasible, and of course the second question cannot now arise.

It is proper to observe, that in using the term "unborn" we exclude the case of a child *in utero*, for, as Erskine says (iii. 8, 76), "It is a good objection against a service, that there is a possibility of a nearer heir *in utero*; for *qui in utero est pro jam nato habetur, quoties de ejus commodo queritur*, L. 7, De stat. hom.; and therefore no service can proceed upon brieves purchased (*hodie*, a petition presented) by a collateral heir to a person deceased who has left a widow suspected to be with child, while there is hope of her delivery."

#### THE ANARCHY OF THE REVENUE LAWS.

AMONGST more than forty thousand Acts of Parliament which cumber the British statute-book, it is surprising how small a number are now actually in force. The necessity for an authorised selection has long been acknowledged, but as yet has led to no important practical result. The various Royal Commissions, supported by the public at enormous expense, seem to have rather impeded than accelerated the completion of the work. It is in vain that we ask these learned bodies to point out one single Consolidation Act in the statute-book, as the fruits of those years of well-paid but non-productive industry which are chronicled with so much complacency in the Commissioners' reports. Almost the only successful instance of a consolidation statute upon anything like a large scale, was the work of others. The Customs Consolidation Act was the nearly unaided work of a single individual, already charged with the performance of duties which most men would have thought sufficiently arduous. Although it cannot be said that Mr Hamel, the Solicitor to the Board of Customs, was completely successful in producing an Act requiring no subsequent amendment, or in which defects do not still exist, yet the improvement made upon the former system was so great, that it is to be wished the example were followed in other departments of law reform. It is a frequent excuse for the disgraceful state into which the statute-law has lapsed, that there is no department specially charged with its superintendence, and that the practice of legislation is left often to the unassisted execution of men utterly ignorant of its principles. Hence the frequent demands for the institution of a department of public justice, whose duty it should be to revise and report upon every bill brought forward. Such an institution might do great good; but before another Government Committee is demanded, it may be as well to remember that we have at present certain public boards charged with the superintendence of certain departments of legislation, and that in these departments the law is as confused, cumbrous, and unintelligible as elsewhere. From the Poor Law Board, which has existed some twenty-five years, we might have expected some assistance to have been given, and therefore some progress to have been made in

the consolidation of the Poor Law statutes. Yet the English Poor Law is lost in a maze of statutes extending from Queen Elizabeth's days to the present time. The Board of Inland Revenue and its predecessors have long had a special department under their peculiar charge, and yet it would be difficult to make the condition of the statutes regulating the imposition and collection of the inland revenue much worse; and although there must be among the members or officials of this Board men as thoroughly acquainted with the subject as it is possible to be, there is, as yet, no hint of any intention on their part to follow the precedent set by the Board of Customs and its intelligent solicitor.

In point of mere numbers, the statutes for the collection of the inland revenue present a goodly array. For the collection of the Excise duties, no fewer than eighty statutes are requisite. So simple a matter as the imposition of stamp duties, one would have thought, might have been regulated by a single well-considered statute. There are at least twenty. The income tax, succession duties, and assessed taxes, require among them somewhere about thirty statutes more. Thus there are in all somewhere about one hundred and thirty statutes directly bearing upon the inland revenue. Their mere number, however, is not their worst feature. They present every characteristic of bad legislation. Had each separate statute regulated a separate department, or the duty upon some separate article, the evil of having to gather together the different parts of the code from the encyclopædia of the statutes at large might have been got over. But when the various statutes are brought together, what do we find? Something, we are afraid, very far from a clear, intelligible body of law. Perhaps the worst evil is, that new statutes have been heaped on old, leaving the latter unnamed and unrepealed. For instance, in what is called the Excise General Regulation Act (7 & 8 Geo. IV., c. 53), the 127th section repeals simply all former laws, statutes, etc., which are in any way repugnant or inconsistent with the new enactments. This, as Dr Bateman (*Laws of Excise*, p. 113) observes, has not even the merit of a general repeal of all previous Excise statutes; it is, indeed, the mere repetition of a well-known common law principle, and leaves the unfortunate reader to discover for himself the precise effect of the new Act. This General Regulation Act, and the Acts for its amendment, exemplify another evil. Both the first (4 & 5 Will. IV., c. 51) and the second (4 Vict., c. 20) of these amendment Acts were required chiefly in consequence of the want of clearness in many of the provisions of the principal Act. The clauses frequently commence, "Whereas doubts have arisen," and then, in place of repealing the doubtful enactments, and putting clearer enactments in their place, it is declared that the old clauses are to have a particular interpretation. Again, the amending statutes seldom clearly explain in every case whether the new enactment is something adding to, or repealing, or interpreting the old. Still another

evil may be exemplified by the history of the General Regulation Act. It too has been occasionally amended in the worst possible way, viz., incidentally in Acts expressly directed to very different purposes. Thus in an Act, the preamble of which is modestly confined to the mention of duties on post horses and hackney carriages (11 & 12 Vict., c. 118), the third clause makes a sweeping important alteration, affecting every prosecution for the recovery of any portion of the Excise revenue. A source of very frequent inconvenience has been the mingling in one statute of provisions for the collection of revenue and police provisions for the protection of the morals of the people, without distinguishing the one from the other. Another defect to which we intend in the sequel to refer more particularly, is the introduction into imperial statutes of language and provisions applicable only to England. In the meantime, however, to illustrate more fully the confusion and anarchy which characterises the Revenue Laws, we have only to select some particular instance,—say from the Stamp Acts, a department with which legal practitioners are most generally conversant, and in which it is requisite at least to know the amount of duty, the mode of paying it, and the consequences of non-payment.

With a view to revenue, as well as for certain advantages supposed to be gained by a limitation in the amount of the paper currency, there have been imposed various duties upon the different varieties of negotiable paper. The last of what may be called the general statutes affecting these duties, is the Stamp Duties Amendment Act of 1854 (17 & 18 Vict., c. 83). It imposes duties upon (1) Inland Bills, payable otherwise than to bearer or order on demand; (2) Foreign Bills; and (3) Promissory Notes, other than promissory notes not exceeding L.100 in amount, payable to bearer on demand, and it gives the scales upon which these duties are payable. The Act does not specify what it means to include under bills or notes; but its second section contains a provision incorporating in a few words all the provisions and schedules of previous Stamp Acts, so far as not expressly superseded. The field for research thus opened is wide enough, as the statute mentions not one of the preceding Acts which are incorporated; but we may assume it to be known that the definitions sought will be found in the schedule to the General Stamp Act, passed in 1815 (55 Geo. III., c. 184). We next require information as to the stamp duty payable on the two kinds of negotiable paper expressly excluded from the Act of 1854. After due investigation, we discover that drafts payable to bearer or order on demand, are—with a certain exception—made liable to the duty of one penny, by an Act passed in 1853 (16 & 17 Vict., c. 59); and, upon a further search, we discover that this exception was repealed by an Act of 1858 (21 Vict., c. 20). With regard to the duties on promissory notes not exceeding L.100 in amount, and payable to bearer on demand, the case is just the reverse of that with regard to ordinary bills and notes: we find the

definition in the Act of 1854, and the scale of duties in the Act of 1815. To complete the inquiry on this particular class of notes, we find the persons who may issue them specified by the Currency Act of 1844 (7 & 8 Vict., c. 32); and the mode in which the duty may be paid in an Act of 1853 (16 & 17 Vict., c. 63),—the second of that year to which we have now had occasion to refer. Regarding the mode in which the duties on ordinary bills and notes are to be paid, we find that the Act of 1854 specifies nothing; and that the Act of 1815 (sec. 11) specifies that they must be written upon paper duly stamped for denoting the duty charged, and that under the pecuniary penalty of L.50. The usual and more severe penalty upon the issuing of unstamped bills or notes, is contained in an old Act passed in 1791 (31 Geo. III., c. 25), which has been held to be incorporated in the Act of 1815, by a clause similar to that by which the provisions of the latter Act are imported into the Act of 1854 (*Field v. Wood*, 1837, 7 Ad. & E. 114). The Act of 1791, which allows no unstamped bill to “be pleaded, or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity,” is in words so clear, stringent, and explicit, that, to use a familiar logical formula, it may almost be said to enact *too much*; and accordingly the English Courts have not ventured to enforce its provisions in their literal sense. In particular, the admission of unstamped bills in evidence has long been permitted in the Criminal Courts. For the subsequent legalisation of that practice, we must return to the Act of 1854 (sec. 27).

The statute law concerning stamps on negotiable paper is not complete till we ascertain whether the post-stamping of bills is permitted. For information on this point we must again search among the statutes of the last century, and may consider ourselves fortunate if we light speedily on the one case (that of the instrument being written on a stamp of proper amount but of wrong denomination) in which it is permitted, by the Act of 1797 (37 Geo. III., c. 136), for in none of the more recent statutes will we find any guiding reference. The last question of all remains—In the case of an unstamped instrument, what authority is to judge whether or not it ought to have borne a bill or a note stamp? Till recently it would have been thought free from doubt, that in a question of this kind arising in Scotland, the decision could alone be given, after all parties had been heard, in the ordinary Scottish Courts of Law. But, although the language of the two statutes is not very clear, it would, by the 13 & 14 Vict., c. 97, secs. 14, 15, and the 16 & 17 Vict., c. 59, sec. 13, seem that it is possible, in certain cases, to anticipate this by a judgment of the English Court of Exchequer. These Acts make it competent to present *any* deed or instrument to the Commissioners of Inland Revenue as to which doubts are entertained about the stamp, to have their opinion upon it, to have it post-stamped if capable of post-stamping, or to have it stamped with a denoting stamp, bearing that the Commissioners think that it

requires no stamp, or is already sufficiently stamped. The effect of the denoting stamp is declared to be, to render a document which bears it receivable in evidence, notwithstanding any objection as to the "same being chargeable with stamp duty, and not stamped to denote the same." Against the decision of the Commissioners an appeal is allowed to the English Court of Exchequer. The Court of Session might thus have decisions ready made for it on such points as, whether some instrument in Scotch form was truly of the nature of a bond or of a promissory note, or whether an instrument was a mere acknowledgment or a binding document of debt. This judgment might be given, not in an Imperial Court, but in the court of another province of the empire, in which Scotch conveyancing was not understood, and Scotch counsel were not permitted to appear.

We are not aware that, in the above investigation into the statute law regarding stamps upon negotiable paper, we have been following any far-fetched or untrodden course, or seeking for any needless information. Yet it has been requisite to consult, on this simple matter, some nine different statutes, extending over various years from 1791 to 1858, and to refer backwards and forwards from one of these Acts to another, in the endeavour to extract the few grains of truth from the mass of repealed and unrepealed enactments. After all this labour, can we be certain that we now have the whole matter before us? Can we be certain that there is no statute before 1791, or none omitted between that date and this, which may, nevertheless, bear materially upon the matter, and which a more diligent toiler among the heaps of statutory rubbish may bring to light, to the astonishment of our courts and the horror of some unfortunate suitor? It is evident that, in ordinary circumstances, the legal practitioner has neither the time nor indeed the materials necessary for undertaking such investigations into the original authorities. In many questions he must be content to gather his information at second hand from the works of compilers, and thus often to leave the advice he must give his client to the chance of error, through the ignorance or inadvertence of the author to whom he is trusting—or even through some error of the press.

We assume that we are justified in concluding that the Inland Revenue statutes require consolidation as much as any other portion of the statutes. In effecting this consolidation, should it ever be attempted, it must not be forgot that the United Kingdom contains other provinces than England, which require some consideration. It has been too often the practice to frame Imperial statutes in language and with provisions which are applicable only to England. Whether this proceeds from Cockney ignorance, and mere contempt on the part of the framers of everything beyond the precincts of London, or from a self-sufficient belief that they knew things which they had never studied, or from a mistaken idea that this was the way to produce uniformity throughout the three kingdoms—the

result is equally absurd and unfortunate to the Scotch suitor, at whose expense the statute has to be licked into shape by the method of "construction." Incidentally the last two Acts which we quoted in reference to the stamps on negotiable paper, afford instances of this fact, and similar instances are perpetually occurring. The Excise General Regulation Act is full of expressions applicable to England only. The same fault pervades the Customs Consolidation Acts, which are otherwise very careful and excellent examples of legislation. Except for the occasional mention of "Her Majesty's Court of Record at Edinburgh," or perhaps of the Lord Advocate, it might have been fancied that the very existence of Scotland had been forgotten. To take an example from the General Customs Consolidation Act of 1853, may we take the liberty of asking the authorities at Somerset House, what meaning they attach to such terms as "venue," "pleading the general issue," and the "plea of not guilty," in civil proceedings in Scotland; or what is the effect of declaring a certain act to be "felony," a term unknown in our criminal jurisprudence? Of course, if the use of such language were essential to the collection of the revenue, we would be content to submit. If the language employed is wholly inapplicable to Scotland without either subverting or superseding the law as it already stands, or wholly unintelligible when applied to Scottish practice, it would be better at once to adopt the principle laid down by the House of Lords in the case of the *Househill Co. v. Neilson* (6 March 1843, 2 Bell, p. 1), which would make it unnecessary for our Courts to take any notice of them whatever. But between such provisions, and provisions directly applicable to Scotland, there is a dubious middle ground, made up of provisions which, by a little ingenious paring and twisting, are capable of being dovetailed into the Scottish system of procedure. Litigation alone can determine whether such provisions apply. In *Christie v. Thomson* (28 Jan. 1859, 21 D. 337), the question arose whether a clause, which directed notice to be given to Custom House officers of an intended action a certain time before raising it, applied to Scotland. The clause as a whole could not apply, and it was one of a series of clauses which, taken together, were quite as inapplicable; but it was possible to select the few words touching the notice from among the mass of extraneous provisions, and engraft them upon our practice. Ultimately it turned out the decision of the question was not necessary for disposing of the action; and as the Court differed in opinion, the field is still open for the exercise of legal ingenuity. That questions such as this do not arise more frequently, is to be imputed more to the desire to conform to the enactments, whenever practicable, than to the skill of the enactors; for it is evident that such questions open the doors to a kind of litigation on technical points of form, which is, of all other kinds, the most fruitless, absurd, and vexatious.

Although we complain of the method of preparing Imperial



Acts of Parliament, it is not to be supposed that any anxiety exists to have Scotland dealt with by special legislation. On the contrary, we are free to admit that the fewer provincial statutes there are the better it will be for both countries. But Imperial statutes might be intelligently framed, and we do not see that there need be any difficulty in having them revised by men acquainted with the systems of Scotch or Irish law, who would, if necessary, introduce special clauses rendering the new enactments applicable and intelligible in their respective countries. Such special clauses might be very few, if the statutes were properly drawn in the first instance. It may be a very heterodox proposal, though doubtless the public would appreciate it, that English and Scottish lawyers should disuse as much as possible their peculiar phraseology, and call things by the names by which they are known in the common language spoken and written in the United Kingdom. If the one would sacrifice the phrases drawn from the Norman French, the other might yield the few lingering phrases still left from the over-refined system of the Roman law, and thus both might meet on the common ground of ordinary language. Lawyers would lose nothing, because nothing is got, save a reputation for charlatanry, by discussing questions in the style and words of a forgotten age; and the nation would gain something when the laws were assimilated throughout the empire, because, when thus assimilated, it is possible they might also be understood.

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THE MONTH.

AMONG the leading cases of the session, those arising out of the Western Bank failure continue to occupy a prominent place. One action has given rise to half-a-dozen others, and these again to condescendences of *res noviter—et hoc genus omne*; while, as each batch of victims is brought up for immolation, lawyers exclaim, in the words of the fanatic, "The good work goes on apace!" The amount of capital sunk in what is at best an unproductive speculation, may be surmised from a statement made by the defenders' counsel as to the official action against the directors. It was to the effect that *two thousand four hundred pounds* had been expended by the liquidators in bringing their action against his clients into Court. Mr Gordon (of counsel for the liquidators) pleasantly observed that they "had sown such seed, expecting to reap a great harvest." The fate of the adventurers who sowed dragons' teeth will doubtless occur to the reader, suggesting unpleasant prognostications as to the destination of the money wrung from the unhappy shareholders, the fruits of unparalleled sacrifices and wide-spread ruin.

The key to this inordinate expenditure, we are given to understand, is to be found in the anxiety of the bank's representatives to guard every avenue and opening against defeat ; and, above all, to avoid the possibility of being out-generated on the relevancy. It would appear that the prospect of having to stand a three years' blockade before leave is given to contest a case on the merits, has become so hateful and disgusting, that suitors are prepared to make any sacrifice rather than submit to it. Now that the First Division, with the approval of the House of Lords (in *Gillespie v. Russell*), have ruled that *relevancy of averment* is alone to be considered previous to trial, reserving all pleas as to the relevancy of the *grounds of action*, we will venture to offer a suggestion for putting a stop to this obnoxious system. Let the Lord Ordinary be empowered to decide without appeal that the action is "relevantly laid." We don't enter on the advantage or disadvantage of appeals on the merits. Judges, of course, are fallible, and the right of review is the palladium of British justice ; but surely after one gentleman possessed of the requisite ability, learning, and impartiality, has applied his mind to the record, and has satisfied himself that it contains apt averments raising an issue of fact, and at least a *probabilis causa litigandi* on the questions of law, it is the merest folly to allow parties to go on disputing on the question whether they shall have leave to dispute.

The Winter Circuit at Glasgow presents one of the lightest calendars known for many years. As usual, a large proportion of the cases are pleas of guilty. There seems to be but one opinion in the profession, that the form of two diets of compareance should be extended to Justiciary trials. The saving of public money—the saving of annoyance to witnesses, would be very great. Nobody is interested in keeping up the present system. The jurisdiction of the High Court might be preserved if desired, by authorizing a Clerk of Justiciary to receive the prisoner's plea, reserving sentence and all objections to the indictment for the consideration of the judge at the sittings.

It must be satisfactory to the public to know that the criticisms passed in this Journal and elsewhere, with reference to the exercise of the Lord Advocate's patronage, have already had some effect in compelling attention to the tendencies of professional opinion. The appointment of Mr A. B. Shand to the Assistant-Deputeship has, we

have no hesitation in saying, been made on professional grounds alone; though it would be premature, perhaps, to regard it as an indication that the rule (thus honoured in the breach rather than the observance) of selection from a narrow coterie, has been entirely abandoned. Mr Shand was one of the number sworn in as honorary Advocates-Depute on the occasion of the last Ministerial change. Mr W. Ivory succeeds by seniority to the vacancy created by the retirement of Mr Clark.

By this time most of our readers will probably be aware the office of Chief Justice of Ceylon has become vacant. Up to the time of our going to press, no appointment has been made; but we are assured on reliable authority that the patronage of this important and lucrative office has been placed at the disposal of the Lord Advocate. This is as it should be. The claims of the Scotch bar to a share in the distribution of colonial patronage have been too much neglected. The Lord Advocate, as Dean of the Faculty, is doubly bound to vindicate the rights of his profession.

Among the topics of legislation proposed for the ensuing session, we may mention the simplification of Burgage Titles, the abolition of tests in parish schools, and certain proposed amendments on the Lunacy Act. The very influential deputation who waited on the Lord Advocate with reference to the last-mentioned subject, had for their object the removal of all causes of dispute between the Lunacy and Poor Law Boards. This they proposed to accomplish by transferring the entire custody and right of inspection of pauper lunatics to the Board of Supervision. But, as the Lord Advocate justly observed, it was precisely with reference to this class of patients that the grossest abuses had been discovered by the Commission of Inquiry; while his information went to the effect that, under the present system, the condition of the pauper lunatics had improved. In answer to a deputation from the Chamber of Commerce, his Lordship promised to introduce a Bill extending the provisions of the "Titles to Land Act" to Burgage tenure; but would not promise anything in the way of Sheriff Court Reform. Mr Moncrieff has very judiciously set his face against the extension of the Small Debt jurisdiction, but has a leaning towards finality in the ordinary jurisdiction of the Sheriff. If any step is to be taken in this direction, a limited right of appeal on points reserved ought to be conceded. Very important questions, relating to rates and other public rights, are constantly arising under actions of little

pecuniary value; and we can conceive of nothing more mischievous in principle than a system which of necessity leaves the determination of such questions to inferior magistrates. In another page will be found a short extract from the *Law Times*, showing the admirable working of the Appeal Court in Magistrates' Cases lately constituted for the determination of similar questions in England.

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## Periodical Literature.

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THE *Law Times* has the following very well-timed observations upon a decision of the Master of the Rolls, in a case which we have noted in our Digest. His Honour is doubtless unaware that our system of recording titles to land makes Scotch heritable securities a safer, and therefore a preferable, investment to that afforded by English real securities. The power assumed by his Honour of dispensing with Acts of Parliament carries us back to the times of Hermand and Eskgrove :—

A point of very great importance on the construction of the 32d section of the Trustees Relief Act has been decided by the Master of the Rolls. That section empowers trustees, unless expressly prohibited, to invest in any real securities in any part of the United Kingdom, or on stock of the Bank of England, etc. The question was, whether this provision was retrospective; that is to say, whether it applied to instruments made before, or only to those made after, the passing of the Act. The Master of the Rolls expressed his opinion to be that it "was not intended by the Legislature to have a retrospective operation" (*Re Miles's Will*, 35 L. T. Rep. 122). We fear that a great number of trustees have already acted upon the presumption that the statute was applicable to all existing trusts, whether created before or after its date; and certainly there is nothing in the language of it to lead to a different conclusion. The words, "when a trustee, etc., shall not by some instrument creating his trust be expressly forbidden," etc., mean, according to the usual construction of the English language, a trustee actually existing. The question should be at once taken for review and settlement by the Court of Appeal. It will be observed also that in the same case the Master of the Rolls said that he could not sanction the investment of English trust-funds on real securities in Scotland, although the Act expressly authorizes investment on "real securities in any part of the United Kingdom." What can be the meaning of this?

The annexed extract is from the *Law Times* of 17th December. It will be read with interest by those who desire an extension of the Sheriff Court jurisdiction, based on rational considerations of public policy.

Few recent statutes have proved so useful in practice as that which gave a direct appeal from the decisions of magistrates. Already the appeals have been many, their number is steadily increasing, and the subjects of them are for the most part of more extensive interest to the public than the greater questions that come before the Superior Courts in other forms. These latter

rarely affect more than a few persons ; but the questions sent up from the magistrates' courts often touch the properties or the liberties of hundreds or thousands. And if this power of appeal is a boon to the public, it is no less a blessing to the magistrates. The laws which they are required to administer exceed, in bulk and variety, any other single branch of the law—perhaps all the rest of the law combined—and every session of Parliament adds half-a-dozen new subject-matters to their jurisdiction. They are called upon to interpret difficult and doubtful statutes, which perplex the profoundest lawyer ; and when they felt that their decision was final—that there was no appeal save to a quarter sessions' court, not more competent to determine the doubt than themselves—their difficulty was much increased, and their responsibility with it. Now, that there is a ready remedy by a direct appeal to an authority competent to decide the question, much of the former anxiety is removed. Again, there will now be a more uniform practice in the magistrates' courts throughout the country. Where doubts existed on the construction of statutes, different minds took different views, and there was in consequence difference in the administration of the same law. The appeal puts an end to this conflict. If magistrates are inclined to be careless, the consciousness that their judgments may be reviewed by a Superior Court will incline them to give greater deliberation and thought to the cases that come before them ; and, finally, it will induce the magistrates to read up their law, for they will be compelled to peruse the reports of the appeal cases as they are decided, and that will certainly create a desire to make better acquaintance with the whole law out of which they grow.

The *Lancet* thus exposes a curious anomaly in the English criminal law. It illustrates in a striking manner the advantages of the flexible common law jurisdiction possessed by the Court of Justiciary.

A curious blot in the criminal law, to which we pointed attention some months since, has again been hit by a country coachman. This man, Thomas Spowage, has, for some reason not explained, indulged in the amiable eccentricity of wilfully administering large and injurious doses of cantharides, a vegetable irritant poison, to a number of the inmates of Staffynwood Hall, near Chesterfield. Symptoms of irritant poisoning followed ; vomiting, gastrodynia, dysentery, and so forth. Surely these are palpable inconveniences, not to say injuries. The legislative body may have their own notions on the subject, but most persons would as lieve be struck or cut as beguiled into taking poison, although its effects should stop short of death. In the case of Heppenstall, on which we lately commented, a large dose of croton oil was administered, from motives of revenge, and a long and severe illness resulted, inflicting permanent injury. Nevertheless, the law provided no penalty in either case. If a man be tapped on the shoulder, he has his remedy by action for assault ; if he be stabbed, by trial for cutting and wounding, with or without deadly intent ; but his stomach may be ruined for ever ; he may be consigned to the perpetual pains of dyspepsia or gastrodynia ; his mucous membrane may be flayed, and all his internal organs chemically and physiologically outraged, and the law will not step in to avenge or to relieve his wrongs. In the present state of criminal justice, the most cruel and subtle injuries may be inflicted with impunity. The cowardly ruffian who throws vitriol into the face of his enemy is justly open to severe punishment ; but the very same substance may be administered internally, and inflict horribly scathing torture, but, so that it does not kill, the crime is not one of which the judges can take cognizance. It is an inconceivable and dangerous anomaly ; no time should be lost in introducing an Act to remedy this defect in the criminal law.

## Legal Intelligence.

**THE BAR.**—The following gentlemen have been called to the Bar during the current Winter Session:—Messrs. A. Nevay, and William N. McLaren, admitted on the 22d November; and Messrs W. A. Brown, and J. H. A. Macdonald, on the 20th December 1859.

**NEW APPOINTMENTS.**—Mr William Atherton, Q.C., M.P., has received the appointment of Solicitor-General, rendered vacant by the appointment of Sir Henry Keating to the judicial bench. The learned gentleman is the son of the late Rev. William Atherton, a distinguished Wesleyan minister. He has represented the city of Durham since 1852, and is what may be considered a very advanced Liberal, being in favour of the ballot, the removal of all religious disabilities, and the extension of the suffrage.—Mr A. R. Clark has, from pressure of other business, resigned his appointment as Senior Advocate-Depute. The vacancy thus created is supplied by Mr William Ivory becoming Junior Advocate-Depute. The office of Depute for the Sheriff Courts, formerly held by Mr W. Ivory, has been accepted by Mr A. B. Shand.—Up to the time of going to press, no appointment has been made of a Principal Commissary Clerk in room of the late Mr Alexander. But on the 22d ultimo, on the motion of the Lord Advocate, the Court appointed Mr Inglis, the Depute Clerk, to hold the office of Principal Clerk *ad interim*.

**OBITUARY.**—The late Mr William Alexander, Principal Commissary Clerk for the county of Edinburgh, was born in the year 1794, and has thus reached the 65th year of his age. Mr Alexander passed as Writer to the Signet on 30th November 1819, and from the commencement of his career displayed talents and industry that won him an advanced position in the ranks of his profession. In addition to his multifarious duties as a practitioner, Mr Alexander devoted much time to the compilation of works on the principles and practice of several important departments of practical law, all of which are distinguished by ability and accuracy. Mr Alexander's first work was an Abridgment of the Acts of Sederunt from the institution of the College of Justice, accompanied by supplements giving a connected view of the subject down to within a few years back. Among Mr Alexander's other works we may mention his Abridgment of the Acts of the Parliament of Scotland, and A Digest of the Bankrupt Act, 2 and 3 Vict., cap. 41,—an Act which we believe Mr Alexander himself drafted. Mr Alexander has for the past ten years held the office of Principal Clerk and Registrar of the Commissary Court of Edinburgh. It is a remarkable coincidence that his appointment was on the 21st December 1849, and his death on the same day and month—21st December 1859. The immediate cause of death was heart disease; and since August last the deceased had been little out of his residence.

**COURT OF SESSION.**—The Court of Session rose for the Christmas recess upon Saturday the 24th ult., and meets again upon Tuesday the 10th. The box-day is upon Wednesday the 4th.

**MEETING OF PARLIAMENT.**—Parliament has been summoned to meet on the 24th instant, for the despatch of important business.

**THE SCOTCH RAILWAY BILLS OF THE SESSION OF 1860.**—The following is a complete list of the Scotch Railway Bills of the approaching Session of Parliament, for which the plans have been deposited with the Board of Trade. The total number of new bills is 173, being an excess of twenty-two over the number introduced in the last Session:—Caledonian (Branches to Lanark), Dumfries, Lochmaben, and Lockerby Junction, Dumfries and Annandale, Galashiels, Innerleithen, and Peebles, Inverness and Ross-shire, Innerleithen and Peebles, Keith and Dufftown, Montrose and Bervie, North British (Extensions and Stations), Symington, Biggar, and Broughton (Peebles Extension), West of Fife Mineral (Extension).

**DUTIES OF PROCURATORS FOR THE POOR.**—We (*Greenock Advertiser*) lately drew attention to rather a novel question which has been started by the procurators for the poor at Greenock, as to whether or not they are bound to act gratuitously in establishing the paternity of illegitimate children whose mothers may have applied for relief to parochial boards. The question came up before Sheriff Tennent, who requested the parties to state their respective grounds in the shape of a short minute and answers. The following is the substance of the procurators' minute:—

Minute for ALEXANDER McDONALD and ROBERT BLAIR, jun., writers, and Procurators for the Poor in Greenock, in the remit to them following upon the petition of MARY COWAN, residing at No. 1, Ardgowan Street, Glebe, Greenock.

1. The Act of Parliament 1424, c. 45, and the relative Act of Sederunt applicable to Sheriff Courts of 11th July 1839, with regard to the gratuitous services of procurators for the poor, do not contemplate their acting in that capacity for a public board constituted by Act of Parliament, like the Parochial Board.

2. The Parochial Board of Greenock, acting upon this view of the matter, have a regularly paid agent—viz., Mr Thomas King, writer, Greenock, who takes charge of all prosecutions in which they are interested, and, particularly, of actions relative to the obligations of individuals to support their wives and offspring.

3. The child in question was born in the Greenock poor's house on 19th July last, and it is a legal charge upon the Parochial Board of Greenock, the mother being unable to support it; and from her own statements she was sent to the procurators for the poor to take steps for establishing paternity, in order that the Board might be put in a position to operate relief against the father of any advances made or to be made by them to the child. The average annual number of such applications made to the procurators for the poor is about forty or fifty, involving a large amount of professional trouble, and sometimes expense, irrespective of the criminal department of their gratuitous duty.

4. By the law of Scotland, incorporating a principle derived from the Roman law, with regard to the peculiar rights and obligations of the *familia*, a bastard is held to be a *filius nullius*. (Weepers, 6 D. 1166, 20th June 1844.) One effect of this principle is, that the father and mother are bound to support it *mutually*. The action of aliment against the father is, therefore, not for a debt due or obligation prestable to the mother, but to the child,—so much so, that she has no right to discharge the father of the future aliment, so as to relieve him from any action for payment on behalf of the child.—(*A. B. v. Chisholm*, 12th Feb. 1842.)

5. There is a direct claim by a mother unable to support her illegitimate child against the Parochial Board, to make good the unfulfilled obligation of the father, which cannot be met by their insisting upon her first discussing him; and so primary and direct is this obligation on the Parochial Board, that the relatives of the mother, or even a stranger, advancing such aliment to the child, have the like action against them for repayment. (*Robert v. Fife*, 5th Feb. 1825, 3d §, 349; Orr, 9th July 1831, 9th §, 928; Weepers, *ut supra*.)

6. The argument which was relied upon by Messrs King and Neill, on behalf of the Parochial Board, at the verbal discussion before the Sheriff-Substitute, was, that the procurators for the poor were bound to carry on the case, because the Parochial Board had no right or title in the first instance to pursue the father, and that it was only after decree was obtained that they could take any action in the matter. Were this view of the law sound, it is admitted that the question would be attended with some difficulty; but the law is quite the other way, as will at once be seen from the following authorities:—*Kirk-Session of Wigton v. Dalziel*, 6th February 1795; Hume, 463; *Pollock v. Clark*, 12th November 1829; Smith's Digest of the Poor Law, p. 138, *art. forum*.

*Plea in Law.*—The Parochial Board being entitled to bring the action in question in their own name, and being the parties directly liable for the support of the child, and primarily interested in operating relief of this burden against the father, are not entitled to insist upon the procurators for the poor, having regard to all the circumstances stated, acting in the matter gratuitously, by putting the petitioner forward as pursuer of the action.—In respect whereof, etc. A. M'DONALD, Pror., ROBERT BLAIR, junr., Pror.

## Digest of Decisions.

### COURT OF SESSION.

#### FIRST DIVISION.

*Appeal*—HILL IN FOX'S SEQUESTRATION.—Nov. 26.

##### *Collusive Sequestration.*

Edward Vigor Fox, Locking, county of Somerset, and "now or lately residing at Haughhead, in the county of Peebles," having come from England to enjoy the benefit of the Scotch system of sequestration, Henry Hill, a creditor of his, petitioned for a recall of the sequestration, on the ground that there was not sufficient notice in the *Gazette* at least six days before the Meeting of creditors, as required by the 67th section of the recent Bankrupt Act; the notice in the *London Gazette* of this meeting of the creditors having appeared only on the 31st May, or four days before the meeting. After a lengthened debate, it was ordered of consent that there ought to be a new meeting of the creditors; no opinion being expressed as to whether the meeting was illegal, the question of personal protection being the material one. Mr Fox was found liable in the costs of the appeal.

CRAUFURD v. SAMSON.—Nov. 30.

##### *Interdict—Possession.*

William Craufurd, flesher in Cumnock, and his wife, had been interdicted from building on a few feet of ground, on which John Samson, provision merchant, had been in use to have standing a water barrel and a few empty barrels. Both parties had titles which might have included this property, and the Sheriff granted the interdict on the statement of parties, which in some measure admitted joint occupancy. The Court refused the reclaiming note; Lord Deas remarking that it was a pity that, instead of spending two years in this Court, the reclaimers had not acquiesced in the decision of the Sheriff, and at once brought a declarator.

GRANT v. GRANT'S TRUSTEES.—Dec. 2.

##### *Intestacy—Heir in spe—Fee in pendente.*

Robert Grant executed a trust-disposition and settlement by which he conveyed the estate of Balgowan, etc. to trustees for certain charitable and religious purposes. He died without leaving issue or any collateral relations, and was consequently succeeded by his father Charles. At



first Charles threatened to reduce the deed on the head of deathbed; but having made terms with the trustees, he, on 19th July 1823, served heir to his son, and on 20th August disposed in favour of his son's trustees. On 13th December 1824 the pursuer was born, the daughter of Charles Grant by a second marriage, and the half sister of Robert Grant, the disponer. Had she been born at the date of her brother's death, she would have been his heir. An action was raised for the purpose of reducing the trust-disposition and settlement of Robert Grant *ex capite lecti*, and the titles made up in his person and in the persons of the trustees. The defenders *inter alia* pleaded that the deeds executed by Charles Grant, the then existing heir of Robert Grant, constituted titles in their favour sufficient to exclude the action. The Court (*diss.* Lord Curriehill) sustained this defence. The Lord President :—The question was, whether Charles Grant's right as his son's heir, undoubtedly good at first, was defeasible or not. It must be borne in mind—(1) that this was a case of intestacy; (2) the father Charles Grant was entered before the pursuer was begotten; and (3) he had disposed in favour of the defenders before the pursuer was begotten. Stair, Bankton, Erskine and Bell were all concurrent in holding that the right of an heir in the position of Charles Grant was absolute, and not defeasible by the emergence of a nearer heir. Certain cases had been cited which related to tailzied and not to intestate successions. In all of them it was assumed that if the succession had been intestate, the doctrine of the authorities would have applied; and he therefore felt himself compelled to give effect to it.

ABERDEEN TOWN AND COUNTY BANK *v.* SCOTTISH EQUITABLE ASSURANCE SOCIETY.—*Dec. 3.*

*Judicial declinature.*

In this case, which was an appeal against a resolution of the creditors of George Gunn of 17th May last, the Lord Ordinary had repelled an objection, to the effect that the appeal had not been timeously insisted in; but on discovering that he was a partner of the Scottish Equitable Assurance Society, he, after hearing parties and writing the interlocutor, refused to sign it. Lord Deas also, when the reclaiming note came before the Court, declined to sit for the same reason. The Lord President said:—After consulting the Judges of the other Division, it was the opinion of the Court that Lord Deas, being a partner in the appellant's society, should not take part in the judgment. On the merits two points arose—1st, Whether or not, in the event of any failure whatever in intimating and acting on the deliverance of the Lord Ordinary in the appeal, it was competent to pronounce a new interlocutor; and 2d, Whether or not, in the circumstances of the present case, the delay on the part of the appellants was such as to deprive them of the benefit of their appeal. On the first point he had no doubt that, if any reasonable excuse was made, the Lord Ordinary had power to renew his interlocutor. On the second point he did not think there had been such undue delay on the part of the appellants as to deprive them of the benefit of their appeal.

M'CUBBIN *v.* VENNING AND SCOTTISH WIDOWS' FUND.—*Dec. 3.*

*Jurisdiction—Competency of Interdict.*

The respondent's solicitor in London was law agent of R. H. Robertson, of the firm of Robertson and Co., merchants in Manchester and

London, now deceased, and was also holder of a policy on his life. The suspender, the trustee on Robertson's sequestrated estate, claims the proceeds of that policy, and has used arrestment on the dependence of an action of count and reckoning called in Court in 1857. Mr Venning raised an action for the proceeds of the policy in the Court of Chancery in 1858, and an order for the payment of the money was obtained. Interdict was applied for, to prevent the Scottish Widows' Fund paying away the money, and to prevent Venning from "using the moneys arrested." Before the suspension came into the Bill Chamber, the money had been paid over to Venning. Lords Ivory and Deas having declined to sit, Lord Mackenzie was called in to make up a quorum. Held unanimously, that an interdict could not be used to supplement arrestments, or to prevent a man using money actually in his possession, and no opinion given as to the consequences of payment by the arrestees. Lord Mackenzie remarked, that he did not think it very surprising that Mr Venning preferred to have the judgment of the Court of Chancery upon these English transactions, which Court, though slow, had given a judgment in an action raised a year after the one in this Court, while in the action in this Court the record was not yet closed.

*Ex parte* KINLOCH (STEWART'S TRUSTEES).—Dec. 6.

*Nobile officium—Trust—Extension of Powers.*

The trustees state in their petition that the trust-deed does not contain any power to borrow, while it would be greatly for the benefit of the estate that money should be raised upon it, for the payment of certain pressing debts affecting it. They therefore asked the Court, in the exercise of its *nobile officium*, to grant them power to borrow. The Lord Ordinary dismissed the petition, holding it incompetent; and the First Division, in consequence of the importance of the question, consulted the other judges; and thereafter, in respect of the opinions of the whole Court, refused the petition; but without prejudice to the trustees adopting other proceedings with a view to obtaining the power they desired, by summary or ordinary action, as they should be advised.

HAYS v. HAY'S TRUSTEES.—Dec. 8.

*Proof—Commission—Foreign.*

This was an application for the examination of a witness, stated to be domiciled in Canada, but who had been for some time resident in Scotland, to lie *in retentis*. The pursuer stated that the witness, after coming under an undertaking that he would give ten days' notice of his intention if he were to leave Scotland, had, in deliberate breach of his promise, gone off to America; that he had stated that he would return about the 1st November, but that he had not come back, and various letters written to his agent, asking information, had remained unanswered. The defenders stated that the witness had been suddenly called to America by family affairs, and that he was expected in Scotland by every mail. The Lord President said:—An application to examine a party about to leave Scotland was different from an examination of a party already out of the country. It was less costly; and secondly, before the witness goes out of the jurisdiction, it may be expedient to get him examined.

The circumstances of the present application were somewhat unusual; and as they were assured that the witness's return might be daily expected, I think they should delay consideration of this application in the meantime.

DOWDY v. WILLIAMSON'S EXECUTORS.—Dec. 8.

*Prescription—Admission.*

The executors of the late Alexander Williamson having found in his books an entry of date 4th April 1844, "Cash lent to Mr William Dowdy, coffeehouse, Murray Place, Stirling, to purchase furniture, L.50," wrote asking him if he could repay it, and received the following answer:—"19th March 1859.—I beg to state that whatever I received from Mr Williamson with a hearty welcome as a gift." The question was, if this is an acknowledgment of resting-owing sufficient to elide the triennial prescription. The Court recalled the judgment of the Sheriff. Lord Ivory said, he was clearly of opinion that this letter was (1) no proof of debt by writ; (2) although there had been an admission of the receipt of the sum, it was conjoined with a qualification denying the debt; and (3) that even had it been in an oath, the qualification was *intrinsic*.

DUNCAN OR GREIG v. DUNCAN.—Dec. 9.

*Heir-apparent—Agreement—Statute 1695.*

James Duncan, sen. died in 1824, leaving heritable and moveable property in Ferry-Port-on-Craig. He had been three times married, and was survived by a widow and by children of all the three marriages. The heritable property was possessed by the heir-at-law in terms of an agreement, until his death in 1842. The question raised in this action was, whether his son, the defender, was bound, in terms of the Act 1695, c. 24, to implement the deed of agreement subscribed by his father, who had possessed as heir-apparent for more than three years. The defences were, that the deed was not binding, because it was not acted on, and because the parties had no power to enter into the agreement; that the Act 1695 did not apply, (1) because the defender's father did not possess the subjects in question during his lifetime; (2) because the deed founded on was not contemplated by, nor within the meaning of the statute; and (3) because it was wholly gratuitous. The Lord Ordinary repelled these defences; holding that the transaction was an onerous one, and that there had been possession in the sense of the statute; and the Court unanimously adhered.

BLACK v. BENTHAM, BOWEN, AND CO.—Dec. 12.

*Obligation—Force and Fear.*

This was a suspension of a charge under a composition contract, by which William Black, provision merchant, Glasgow, had been discharged, on the ground that he had admitted the claim at the instigation of the charger's mandatory, and under concussion. The Court, seeing that the claim had been lodged with the other claims without objection, and voted on, refused the note.

REV. WM. GRAHAM v. REV. WM. SMITH.—Dec. 13.

*Presentation—Election Scrutiny—Oath of Allegiance, etc.*

Action was raised by the Rev. William Graham, of Newhaven, to have it found that the Rev. W. Smith had not been validly presented to the parish of North Leith; but that, on the contrary, he (Mr Graham) had been validly presented. By the Act 1606, cap. 27, the patronage of the parish is given to the haill inhabitants thereof. The presentation in favour of the Rev. W. Smith was signed by 1900 persons, while that of Mr Graham was signed by 920. Mr Graham, however, contends that—(1) Mr Smith, before accepting it, did not take or subscribe the oath or oaths required by law (which, he says, is the oath substituted by the 21 & 22 Vict., cap. 48, in lieu of the former oaths of allegiance, supremacy and abjuration); and (2) that on a scrutiny it would be found that a majority of the properly qualified patrons had signed the presentation in his (Mr Graham's) favour. The Court adhered to the Lord Ordinary's interlocutor granting a commission to make a scrutiny. The Lord President said:—The certificate of the defender's oath had been too critically examined. If Mr Smith's certificates were cut down, Mr Graham's could not fare much better. Both parties were agreed that they had taken only the oath provided by the statute of the Queen, and it didn't suit either party to contend that that was wrong. As to the patrons, a scrutiny was quite proper—in fact, it afforded the only means of expiscating the case. Their Lordships concurred.

A. v. B.—Dec. 14.

*Issue—Amendment of Record.*

This was a process of interdict of a poinding executed by a creditor who, as the debtor alleges, had agreed to an arrangement whereby the debtor's affairs should be wound up under a trust-deed, the date of which is incorrectly set forth in the record. The debtor proposed to omit the date from an issue for trying the question as to the alleged arrangement. The Court held that the date must be in the issue; but of consent, and on payment of expenses, allowed the record to be amended to the effect of having the date corrected.

RICHARDS v. CHISHOLME AND LEITHHEAD.—Dec. 15.

*Reparation—Issue—Libel.*

The defender, Mr Chisholme, who is chairman of the proposed Carlisle, Langholm and Hawick Railway, read, at a meeting of the Company, a letter from the co-defender, purporting to state the substance of a private telegram forwarded to the promoters of a rival scheme. The pursuer, who is station-master and agent of the Telegraph Company at Hawick, alleges that the proceedings of the defenders were injurious to him, as they by necessary implication charged him with violating the duty which is imposed on him as agent of the Company, to keep secret all messages passing through his hands; and that the defenders' averments in regard to the message in question were false and calumnious. The defenders maintained that their statements contained no imputation against the pursuer, and that the information contained in Leithhead's letter was quite capable of being acquired without any blame being imputable to the pursuer. The Court approved of issues for the trial of the case, in which the ques-

tions are, Whether the defender Leithhead's letter in whole or in part related to the pursuer; and whether the defenders, by publishing the same, falsely and calumniously represented that the pursuer had violated his duty as agent of the Telegraph Company?

THE SECRETARY OF STATE FOR THE WAR DEPARTMENT v. THE MAGISTRATES OF EDINBURGH.—*Dec. 16.*

*Property—Jus Coronæ—Charter.*

This case relates to the property of the Esplanade of the Castle of Edinburgh, the ground forming the banks on both sides of it, and the ground around the foot of these banks and the Castle rock, forming part of the Princes Street Gardens. These subjects are claimed by the Board of Ordnance as part of the patrimonial property of the Crown, and by the city of Edinburgh under the Golden Charter of James VI., dated 1603. The Lord Ordinary (Neaves) sustained the right of the Crown to the whole of the property in dispute, which includes the ground on which the Edinburgh and Glasgow Railway is formed, for which the city got compensation from the company. The grounds of his Lordship's judgment were, that the charter of 1603 had been resigned by the city to the Crown, and that the Crown had prescriptive possession. The city reclaimed against his Lordship's judgment; and the case having been debated last June, the judgment of the Court was now delivered by Lord Deas in a learned and elaborate speech. The Court adhered to Lord Neaves' interlocutor, and a remit was made to him with a view to procedure being taken for having the boundaries marked off.

M<sup>c</sup>WILLIAMS v. MAGISTRATES AND COUNCIL OF STRANRAER.—*Dec. 16.*

*Burgh—Election—Reparation.*

This was an advocacy from the Sheriff Court of Wigtownshire of a claim by John M<sup>c</sup>Williams, who had been for twenty years burgh-officer of Stranraer (his appointment being annually renewed), for a year's salary, and compensation for the loss of the perquisites of office. In November 1856 a town councillor became disqualified from non-residence, and the Council adjourned until a following date without making the usual appointments. At the adjourned meeting an interdict was served on them from proceeding with the elections. At a meeting held on the 29th November, pending the interdict, a Council meeting was called by the Provost, which was attended only by a minority of Council, who, the whole magistrates in office being present, renewed the appointment of Mr M<sup>c</sup>Williams. After the interdict was recalled, another meeting of the Council was called, which was attended by none of the minority, but only by the members of the majority, who ordered the minute of 29th November to be deleted, and appointed another person to the office of burgh-officer. The pursuer continued to act for some time as burgh-officer in certain of his duties, until forbidden in February 1857. The Lord President thought the advocator had been ill used; but when party feeling runs high, such acts, which were to be regretted, sometimes result from the conduct of parties. The election of 29th November 1856 could not, however, receive effect. The election of this officer was made annually, and it was not necessary to go into the question what power the magistrates were entitled to exercise in that matter. The interdict served at the previous meeting stopped their proceeding further; pend-

ing that, an assemblage of the minority took place, and proceeded to do part of those things which the full Council should have done. In his opinion, the minority had no power to act, nor did he think the doctrine of tacit relocation applied, because the whole matter was in abeyance, and the period of appointment had not yet arrived.

**MACFARLANE v. THE LORD ADVOCATE.—Dec. 17.**

*Exchequer—Inland Revenue—Drawback.*

The pursuer, who is a wine and spirit merchant, brought this action against the Lord Advocate for relief of the duty paid on ten puncheons of spirits alleged to be lost by breakage, or other unavoidable accident. He had previously applied to the Commissioners under the recent Excise statute for relief of the duty; but after investigation the Commissioners refused to grant it, not being satisfied that the loss arose from unavoidable accident. The Lord President said the Court could not interfere in the way proposed. The action, in effect, was an appeal from the judgment of the Commissioners, but the statute gave no such appeal. The statute imposed a certain duty on the Commissioners, but it was not alleged that they had not made the requisite investigation. He did not say what the Court might have done if the allegation had been that they refused to act. Judgment of the Lord Ordinary adhered to.

**Adv., BROWN v. SCOTT.—Dec. 21.**

*Poining the Ground—Relevancy.*

This was a process of poining the ground raised by John Scott, the holder of an heritable security over the house No 14, St James' Terrace, Glasgow, against Andrew Brown, merchant, Glasgow, alleged to be "the tenant or occupant, and in possession of said subject" and others. Brown defended the action, alleging that he was not tenant of the subjects, and did not owe rent or any other debt to Petrie, the debtor in the heritable bond, and that while the house in question was building he agreed to purchase it from Petrie, on certain conditions as to its completion; he afterwards entered to the premises in pursuance of that agreement, although the house was not at the time in the condition agreed on. A submission was entered into in October 1857 betwixt Brown and Petrie on the subject, and the arbiters found that Petrie was bound to give a substantial house. Petrie having been sequestrated, his trustee refused to adopt the contract of sale, and raised this process for arrears of rent. The Court dismissed the action, holding that it was not *properly laid*, in respect that, on the pursuer's own statements, there was nothing due by Brown of the nature of rent. There might be something due by him of the nature of recompense to the owner, or to those in his right, in respect of his occupation of the premises; but it was not rent, and that was sufficient to put an end to the case against him.

**MACMILLAN v. THE FREE CHURCH OF SCOTLAND.—Dec. 23.**

In this celebrated case, an elaborate judgment has now been pronounced, repelling the defenders' preliminary objections, and appointing them to satisfy the production, i.e., the decree of the General Assembly sought to be reduced. Their lordships gave no decided opinion as to the relevancy of the pursuer's grounds of action.

## SECOND DIVISION.

M'PHUN v. M'INTOSH.—Nov. 16.

*Trust—Remuneration of Trustees.*

In this case, a trust-deed in favour of the defender, Mr L. Mackintosh, S.S.C., and the late Mr J. Monteath, writer in Glasgow, contained clauses authorizing the trustees to appoint one of themselves as factor, and to give him a suitable salary; and also to appropriate a suitable gratification for their own trouble and responsibility. The Court remitted to Mr W. Moncrieff, accountant, to examine and report how much the trustees were entitled to as factors' fee, and as a "suitable gratification" for their trouble as trustees; under the reservation that the trustees were not entitled to make any charge as law agents.

*Ex parte MARTIN et al.*—Nov. 17.*Intimation in Exchequer Petitions.*

Under this petition for the appointment of tutors-dative under the Exchequer Act (19 & 20 Vict., c. 56, § 19), the question arose, whether intimation fell to be made only on the walls and in the minute-book, as in the ordinary case, or also by advertisement, in consequence of the proceedings being taken under the Exchequer Act. The Court, without committing themselves to this course in every case, were of opinion that where, as in the present case, all parties were sufficiently represented, intimation on the walls and in the minute-book was sufficient. The case having been adjourned for the examination of authorities, in consequence of the petition being raised within the year, the petitioner produced a deed of renunciation by the tutor-at-law. The Court granted the petition in respect of the deed of renunciation by the nearest male agnate, now produced, and nominated the tutors-dative, on condition that they should find caution.

JOEL v. GILL.—Nov. 24.

*Collusive Sequestration—Designation.*

In this case the Court last session reversed the judgment of Lord Kinloch; held that the bankrupt was, at the date of presenting the petition for sequestration, subject to the jurisdiction of the Supreme Courts of Scotland, within the meaning of the 13th section of the Act 19 & 20 Vict., cap. 79; and remitted to the Lord Ordinary to hear parties on the other grounds stated for recalling the sequestration. The main question having come before the Court, it was argued for the petitioner, that the sequestration ought to be recalled—(1) because the designation of the bankrupt in the petition for sequestration was in itself so inaccurate, defective, and insufficient, as to come short of the requisites of the Bankruptcy (Scotland) Act, 1856; (2) because the process of sequestration was a fraudulent scheme on the part of the bankrupt to obtain his protection and discharge without due notice to his creditors, and without allowing them due facilities for protecting their interests; and (3) because no mandatory for the concurring creditors had appeared or had been sisted under the petition for sequestration. The designation complained of was: "William Gill, sometime residing at Park Villas, Richmond, in the county of Surrey, lately residing in Tobermory, in the Island of Mull." And to this it was objected that there ought to have been a statement

that he was a barrister-at-law, and had a house at Bayswater. The Court (*dis.* Lord Benholme) refused the petition. Lord Justice-Clerk:—The fitness of the designation did not depend on the length of time it may have applied to the person. No doubt it was reasonable that a party coming recently from another place should state his former residence. But this was not necessarily, on proper legal principles, a part of his designation at all. Suppose that Mr Gill had started business as a small grocer in Tobermory, and had designed himself thus. If he had been so for forty days, his proper designation—and indeed his only proper designation—would have been “grocer in Tobermory.” If a man had no occupation at all, it was clear that he could only be designed by his present residence. But then it was said that he is a barrister-at-law, and that therefore this is a part of his proper designation. Was it necessary to insert, as part of his designation, a description of him as a member of a profession which he had given up? This might in many cases be improper, and might mislead unless the words “lately” or “formerly” were added. Undoubtedly, however, when a man had no profession or occupation, and his residence at his present place of abode had been very short, to describe him only by a present place of residence, gave a very imperfect designation. If it could be shown that a party had purposely obtained this description to enable him to carry through his sequestration, that might be very material on the question of fraud. They were now considering whether this designation was so bad as to be a fundamental nullity, so as to have forced the Lord Ordinary, when granting the sequestration, to have refused the petition as radically null. It was very important to distinguish between what may be necessary in the way of publication, and what may be necessary to make this process of sequestration a good process in this Court. As to the other ground of objection, it was not necessary to say more than that the allegations in articles four and five were totally insufficient to support a case of fraud.

THE CASTLE-DOUGLAS AND DUMFRIES RAILWAY CO. v. LEE, SON,  
AND FREEMAN.—Nov. 25.

*Interdict to prevent obstruction in opening the Line.*

The complainers, who are desirous to open their line for traffic, are opposed by the contractors, Lee, Son & Freeman, who maintain their right to prevent this till the works are taken off their hands, and a certificate of completion granted by the arbiter named in the contracts. The Board of Trade had granted a certificate to the effect that the line might be opened. The arbiter has pronounced an interlocutor to the same effect, and appointing the contractors to execute the remaining operations in such a manner as not to interfere with the traffic on the line. The Lord Ordinary (Jerviswoode) granted interdict to prohibit the contractors from stopping or hindering their traffic; and the Court adhered.

*Susp.,* URIE v. LUMSDEN *et al.* (LIQUIDATORS OF THE WESTERN BANK).—Nov. 25.

The complainer, Mrs Urie, having succeeded to twenty Western Bank shares on the death of her husband, was registered as a partner of the company in September 1853. Her son being appointed by the Bank their agent at Kilmarnock, she was called upon to transfer her twenty



shares to the Bank in security for his intrusions. The transfer, of course, was absolute; but there was a back letter acknowledging that the Bank held the shares in trust for her. Mr Urie resigned the agency in October 1855; but the shares were not retransferred to his mother till August 1857, two months before the Bank stopped payment. On the 14th December 1858, the liquidators obtained in the First Division a summary decree against certain contributories, on which decree the liquidators have now charged Mrs Urie for payment of a call of L.2000. She raised suspension of the charge on the ground that the Bank, by delay in retransferring the shares to her, occasioned loss to her, as she could have sold the shares at a higher value; and that she was induced to accept the retransfer by means of fraudulent representations, or at least fraudulent concealment of material facts. The Court refused the note, holding that as the shares had been merely in the hands of the company as a security, and the transfer to Mrs Urie was merely a reassignment to the owner, the plea of fraud, as leading to the acquisition of the property (*dans locum contractus*), was untenable. Even if there had been unreasonable delay, it would only give a claim for damages, which, not being a liquid claim, could not be set off, in terms of the Joint Stock Companies Act, sec. 17, against a call regularly made in virtue of that Act.

SCOTT v. NORTH BRITISH RAILWAY CO.—Nov. 29.

*Contract—Reparation.*

In 1854 the North British Railway Company offered the advantage of season tickets to parties living farther than eight miles from Edinburgh who have to travel to town on their daily business avocations. The pursuer obtained a ticket of this nature. It seems that in winter the Company have not only diminished the number of their trains on the North Berwick branch, but have given up using steam on it, and only use the old modes of traction. The pursuer complained that while he erected a house at North Berwick on the faith of the contract, the delay occasioned by the absence of locomotive power amounts to a breach of contract. The Court held the action to be irrelevant, in respect it appeared that the conditions of the contract as to residence, etc., had not been complied with by the pursuer.

MR AND MRS ADAMS v. SKAE *et al.*—Nov. 30.

*Vesting—Trust—Settlement—Clause.*

The late John Croom, residing in Dundee, left his property to certain trustees, directing them (in certain events) "to divide and apportion the whole residue equally among the said John Croom Wallace, Esther Keith, Charlotte Keith, Mary Keith, and the lawful children then procreated of the body of George Croom, and to the survivors of them, share and share alike, and that *per capita* and not *per stirpes*." He afterwards directed that the shares provided to the children of George Croom "shall be paid equally to and among the whole children of the said George Croom, whether procreated at the period of division, or subsequently procreated, and to the survivors and survivor of them, on their respectively attaining the age of twenty-one years, or on the death of their fathers, whichever of these events shall last happen." Subsequently he declared that, "on the eldest of the said residuary legatee attaining the age of twenty-one, then the whole of the said legacies before

mentioned shall vest; declaring, nevertheless, that in case any of the children of the said George Croom shall die after the said period of division, and before the respective terms of payment, without leaving lawful issue, then the share vested in such decesser shall be paid to the survivors and survivor of them equally, subject always to the same provisions and declarations applicable to their original shares." Mr George Croom left issue, all of whom survive except one, Mary Croom, who died in minority, leaving, however, a will in favour of her sister, Mrs Adams. The question was, whether, under John Croom's settlement, Mary Croom's share had so vested in her that she was able to test, and thus to transfer the right to Mr and Mrs Adams; or whether it must fall to be divided among her surviving brothers and sisters? The Court held that Mary Croom's share had not vested to the effect of enabling her to defeat the substitution to survivors.

*Appeal, GRANT IN GRANT'S SEQUESTRATION.—Dec. 1.*

*Bankruptcy Appeal—Bill Chamber.*

This appeal against the decision of a Sheriff affirming the deliverance of the trustee in a sequestration, was presented in time of vacation, and bears to have been transmitted to, and received by the Bill Chamber clerk on the 20th September last. Appearance was entered for the trustee on the 7th October following, but the appeal was not presented or enrolled before the Lord Ordinary until the 18th November, during the sitting of the Court. The Lord Ordinary, entertaining doubts as to his powers to deal with the appeal after the sitting of the Court, and conceiving the point to be one of practical importance, reported the case to the Judges of the Second Division. The Lord Justice Clerk:—The statute provides that "a note of appeal be lodged with, and marked by the Sheriff-Clerk within eight days from the date of such deliverance, failing which the same shall be final; and such note, together with the process, shall be forthwith transmitted by the Sheriff-Clerk to the clerk of the Bill Chamber." The manner of bringing up the appeal is therefore by transmission by the Bill Chamber clerk along with the process. It is then in the Bill Chamber, and the Judge is the Inner House during session and the Lord Ordinary on the Bills during vacation. The policy of this rule is evident. The statute intended the process to be as summary as possible; so, to save delay and a double appeal, the process goes at once to the Inner House during session. We therefore carry out, not only the words, but the spirit, of the Act in holding that the Inner House is the proper and only Court in time of session.

*COUPER et al. v. BURN et al.—Dec. 2.*

*Society—Chapel Trust—Minority.*

This action arose in consequence of a division which took place in 1852, in the denomination known as the "United Original Seceders," and it relates to the chapel property of the Associate Congregation, or Congregation of Original Seceders in Thurso. In the year 1852 a motion for union with the Free Church was carried in the Synod of Original United Seceders (the governing body of the denomination), by a majority of 1—32 voting for the union, and 81 voting against it, and

protesting and refusing to unite. The minority of the Synod continued to exist under their original name, as United Original Seceders, and the minority of the congregation at Thurso still retain the name of the Original Secession Congregation of Thurso. The majority of the congregation retained possession of the chapel and other property, and action was brought by the minority to establish their right to these subjects. Lord Wood,—delivering the opinion of the Court, stated, that although this was purely a question of civil patrimonial right, it was necessary to consider certain religious and ecclesiastical doctrines and forms. The Court took cognizance of these doctrines and forms as matters of fact, without expressing any opinion regarding them. The property stood on a feudal title, vesting the right exclusively in the congregation, not in the Synod. The decision of the Synod could not therefore affect the rights of the congregation, which must be determined by the answer to the question, Which portion of the congregation adhere to the original constitution of the society? There could be no question that the pursuers had adhered strictly to their original principles. The defenders, on the other hand, had united with the Free Church, which differed in some fundamental and material points. These were—(1) the perpetual and binding obligation of the covenants, which the Secession held and the Free Church did not hold; (2) the Divine right of presbytery, which the Secession held and the Free Church did not hold; (3) the total opposition of the views held by the Free Church and the Secession with regard to the Revolution settlement and the Treaty of Union. On these grounds judgment must be given in favour of the pursuers.

DOUGLAS v. MONTEATH'S TRUSTEES.—Dec. 7.

*Judicial Factor—Trust.*

In this case, the Court last session had determined that the trust-estates of Archibald Monteath and James Monteath must be kept distinct, and it was thought necessary that a judicial factor should now be appointed on Archibald's estate. The Lord Justice-Clerk said it was unnecessary to consider the question whether or not it was possible to do without a judicial factor; but to appoint one was clearly the course most expedient for the interest of both parties. The trust-funds could not be conveyed under the petition, except by one who had a proper title of administration. It was an unrepresented trust-estate, in so far as the title to administer was concerned.

BRYCE v. CHALMERS.—Dec. 14.

*Contingency—Judicature Act, sec. 9.*

The decree in a suspension, although final, was never extracted, and the suspender has since lodged a minute of reference to the respondent's oath. In this state of matters the respondent caused a second charge to be given on the same diligence. A second suspension having been presented, the Lord Ordinary (Mackenzie) passed the note on the ground that "it is incompetent for the charger to give a new charge on the original diligence before the decree in the process of suspension is extracted." When the case appeared in the printed roll, the respondent lodged a minute abandoning the charge. The suspender then moved the Lord Ordinary to find him entitled to expenses in that suspension. This motion was met by a counter-motion, that the process should be remitted

to Lord Ardmillan *ob contingentiam* of the first suspension, in terms of the 9th section of the 48 Geo. III., cap. 151, which provides, "that where any action, etc., has been brought before one of the said Divisions or the Lord Ordinary thereof, the other Division or the Lords Ordinary thereof shall remit any action, etc., subsequently brought before them relating to the same subject, matter, or thing, or having a connection or contingency therewith, to the consideration of the Division or Lord Ordinary before whom the first action, etc., had been previously brought." The Lord Justice-Clerk :—The peculiarity in the present case was, that the original action before Lord Ardmillan had been exhausted by a judgment on the merits, including expenses, while the action brought before Lord Mackenzie to try the competency of the charge was disposed of, except with reference to expenses. Both causes were thus in substance at an end. In that before Lord Ardmillan, although there had been a judgment on the merits and on the question of expenses, which had become final, it was still competent to make a reference to oath, and a minute making such reference had been lodged. Judgment could be pronounced on that reference, and the cause was therefore in Court. The cause before Lord Mackenzie was also a depending process, the question of expenses still remaining to be settled. It might, however, have been a delicate question whether, if Lord Mackenzie had pronounced a judgment on the merits, the cause could have been remitted to another Lord Ordinary to decide the question of expenses.

COCHRANE *v.* SMITH.—Dec. 16.

*Prescription—Property—Church.*

This was a declarator of right by the minister of the first charge of Cupar to a piece of ground as part of his benefice. The ground was possessed for more than thirteen years previous to 1824, by his predecessors in office, and he founds his claim to it on the *decennalis et triennalis possessio*. The defender is at present in possession, and has been so during most of the time that has elapsed since 1824. The Court assoilzied the defender, holding that there was neither real nor constructive possession on the part of the pursuer. Actual possession having been abandoned since 1824, he could not found on the thirteen years' possession prior to that date, for the purpose of depriving the present possessor of his possession, or requiring him to produce a valid title in support of it.

## OUTER HOUSE.

November 26.—LORD KINLOCH.

SMITH *v.* HEWETSON.

*Default.*—The defender stated that the pursuer had failed to comply with an order pronounced in June last, to print the record. The Lord Ordinary observed, that it was competent to decern against the pursuer for default, in the event of his continued refusal to obtemper the order, and of new ordained him to print "with certification."

BEATTIE *v.* MATHER.

*Record.*—Where a defender's revised condescendence had been enlarged from twelve to twenty-eight articles, the Lord Ordinary observed, that

this was contrary to the spirit of the statutory provisions. He should allow the pursuer time to consider whether he would require a second revisal. If such were necessary, it must be at the expense of the other party.

November 29.—LORD JERVISWOODE.

*Ex parte* WILSON.

*Jurisdiction.*—This was a petition for authority to dispense with the citation of next of kin; and it was argued that, as the summons had not thus been served, the petition was not "incident to a depending action," and was therefore competently brought before the Lord Ordinary. The Lord Ordinary observed, that the Court was not disposed to attach much weight to the general descriptive words above quoted; and that the rule was, that all petitions except those specially enumerated in the 4th section of the Act (20 & 21 Vict., cap. 56) must be enrolled in the Inner House. Petition withdrawn.

December 1.—LORD JERVISWOODE.

DOUGLAS v. DOUGLAS.

*Interim Payment.*—On a motion for payment of L.1000 to General Douglas, a claimant in this estate—objected by the trustees, that the claimant had already received L.12,000, besides entering into the possession of heritable estate under the trust; and that it was doubtful, in one view of the settlement, whether any balance remained due. The trustees were at least entitled to withhold payment until the accounts had been adjusted. His Lordship said they might renew the motion, after the accounts had been adjusted.

December 2.—LORD JERVISWOODE.

*Ex parte* FRASER.

*Intimation.*—The petition prayed for intimation to the known agents of certain parties, resident abroad, who were claimants in a relative process of multiplepinding. *Observed*—That the responsibility of resorting to intimation in this way, instead of edictal citation, must rest with the petitioner. If the agents of the parties were willing to accept service, that would probably remove the difficulty.

December 6.—LORD ARDMILLAN.

MILLAR v. COOK.

*Amendment of Libel.*—This was an action of declarator and molestation, in which the pursuer sought to have it declared that he had the sole right of property in the lands of Wester Sheardale and others in Clackmannanshire free from any right of way, etc., over and upon the said lands. After defences had been lodged, the pursuer moved for leave to amend the libel by inserting words of limitation after the word "lands," viz., "Whether running in a direction from east to west, or other direction, through the low lands of Wester Sheardale near Mollockfoot." Lord Ardmillan held that this was substantially a restriction of the conclusions of the summons, and not an "amendment;" and therefore allowed the pursuer to lodge a minute of restriction in similar terms to the proposed amendment, reserving the question of expenses.

## December 8.—LORD JERVISWOODE.

BANNERMANS v. INNES.

BANNERMANS v. MITCHELL.

*Diligence.*—The pursuers are claimants of the large succession, heritable and moveable, left by the late Miss Jane Innes of Stow, alleged to be worth about L.2,000,000 sterling.

The case was now heard upon a motion of the pursuers for leave to search the churchyard of Belhelvie, in Aberdeenshire, for a certain tombstone, which the pursuers say stood in that churchyard till about twenty years ago, when it disappeared, and which, they say, they have recently, learnt was buried and hid somewhere in the churchyard. This tombstone is alleged to have recorded the deaths of one Thomas Simpson, who resided at Darrahill, and his wife, Jean Adams. The pursuers allege that they have ground for suspecting that the defenders are descended, not from the Thomas Simpson, Darrahill, who married an Innes, but from a cotemporary of the same name, whose tombstone is sought to be recovered. It appeared from the statements at the bar, that for some months past, each party had three persons watching the churchyard day and night, lest the other party should do anything in the churchyard to alter its existing condition. The Lord Ordinary said that he would not himself dispose of a matter so novel and important in its character, but would report it to the Court; and asked Mr Black to consider whether the pursuers would not make their motion in more favourable circumstances if they first got issues adjusted. Motion delayed accordingly.

## December 13.—LORD NEAVES.

MONTGOMERY v. WATSON.

*Decree in Absence.*—This was a process of suspension and interdict, to prohibit the public from fishing in Loch Leven. A considerable number of persons resident in the vicinity were called as defenders. A motion, to have the interdict made perpetual against three parties who did not appear, was opposed by the other defenders, on the ground that it might be prejudicial to the alleged public right. Lord Neaves held, that as there were no declaratory conclusions, the decree sought could have no effect except as regards the interests of the absent defenders, and granted interdict as craved.

## December 15.—LORD ARDMILLAN.

— v. —

*Evidence—Privilege.*—In an action of divorce, held, on appeal from the Sheriff Commissary, that it might be the duty of the judge to warn a witness that she was not bound to answer the question, Whether she had passed the night with the defender. It was necessary, however, that his Lordship should put the preliminary question, Whether she knew the defender was a married man; because, if she were not aware of his *status*, the adultery, as an indictable offence, had not been committed by the witness, and she was not entitled to protection. In any view, the examination might be carried up to a point which would enable a legal inference to be drawn as to the conduct of the defender. The question was raised on an objection by the defender's counsel.

*December 17.—LORD KINLOCH.**MILLAR v. MURRAY.*

*Record—Jurisdiction.*—This was a process of division of commony. Lord Handyside had ordered condescendences to be lodged by the parties interested; and papers had been lodged, but the record was not closed. It was now objected, that the procedure was irregular, as the Court of Session had no power to make up a record in actions of this nature. His Lordship, after advising the case, found that it was necessary to remit to the Sheriff of the bounds to make up a record, and remitted accordingly.

*December 20.—LORD JERVISWOODE.**Pet. JOEL FOR RECALL OF GILL'S SEQUESTRATION.*

In this case the petitioner's mandatories recently lodged a minute withdrawing as mandatories; and to-day the Lord Ordinary pronounced an interlocutor, holding them as having withdrawn. The case, we understand, is about to be carried by appeal to the House of Lords.

*DAWSON'S TRUSTEES v. COLONEL AND MRS MACLEAN.*

*Jurisdiction—Foreign.*—This is a branch of the case relating to the Carron Company, in which the complainers and respondents were both partners. In 1839 the respondents sold to Mr Joseph Dawson ten shares of the company's stock. In February of the present year the respondents filed a bill of complaint in the Court of Chancery against the complainers as trustees and executors of Joseph Dawson, praying to have the sale set aside. Two of the complainers, William and Thomas Dawson, refused to become parties to the Chancery suit; and ultimately the present respondents had to apply to the Court of Chancery to get an executor nominated to Joseph Dawson. The complainers, W. and T. Dawson, in name of Dawson's trustees, have also raised in the Court of Session a process of multiplepoinding and exoneration, calling, among others, the respondents and all the other persons from whom it was alleged that Joseph Dawson had bought shares fraudulently. The respondents and others have raised in the Court of Session actions of reduction of the sales of shares, which have already attracted some notoriety. In these circumstances, Dawson's trustees raised a process of suspension and interdict to have the respondents interdicted from prosecuting the proceedings in the Court of Chancery, on the ground that the Courts in Scotland are the only competent tribunals for determining the questions raised as to the estate of Joseph Dawson; and in respect that the respondents have themselves raised an action in Scotland. The respondents, on the other hand, maintain that they are resident and domiciled in England, and are not subject to the Scotch Courts; that as the acts sought to be interdicted are to be performed beyond the jurisdiction of the present Court, an interdict could not be enforced. The Lord Ordinary on the Bills passed the note, but refused the interdict.

*December 3-21.—LORD KINLOCH.**PEARSON v. WESTERN BANK DIRECTORS.**INGLIS v. IDEM.*

*Res noviter—Sist.*—In these actions the defenders have given in a condescendence of *res noviter*, in which they state that since the record was

closed, an action has been raised against them at the instance of the liquidators. The grounds of the action set forth, and the conclusions founded thereon, in the last-mentioned action, they state, embrace the whole of the pursuers' averments in the present actions, and also substantially embrace the conclusions of the present actions. The sums concluded for in the new action, with the assets in the hands of the liquidators, would more than replace all the paid-up capital and all the paid-up calls, and enable the liquidators not only to relieve the pursuers of the calls on their shares, but also to pay to them a sum equal to the price, with interest, which they paid for their shares. The defenders plead—(1.) that the present actions should be dismissed, in respect of *accumulatio actionum*; or (2.) that, at all events, they should be sisted until the liquidators' action is disposed of. The pursuers oppose the sisting, but offer, if the defenders make payment to them of the sums concluded for in their actions, to grant assignations in their favour of all their claims. Counsel have been heard at great length, both in regard to the proposed sist and on the relevancy; and the Lord Ordinary has taken both cases to *avizandum*. We shall report his interlocutor.

December 21.—LORD ARDMILLAN.

GILLESPIE v. RUSSELL.

In this celebrated case, issues were reported to the Inner House. The pursuer proposed issues (1.) of fraudulent misrepresentation and concealment; and (2.) of fraudulent misrepresentation alone. The defenders objected to the first issue altogether, and desired to introduce a specific statement of facts into the second.

December 22.—LORD JERVISWOODE.

STEDWARD v. MOLLISON.

*Value of Action.*—An advocacy *ob contingentiam*, where the sum in the original summons, although a multiplepoinding, was under L.25, held incompetent, in respect of § 22 of the Sheriff Court Act, 16 & 17 Vict., cap. 80; and action dismissed, with expenses.

## HIGH COURT OF JUSTICIARY.

ADV.-GEN. v. SIMON FRASER.

*Forgery—Uttering.*

Simon Fraser, a sheriff-officer in Linlithgowshire, was indicted—(1.) with the forgery and uttering of the subscription of a witness to an execution of citation; (2.) the forgery and uttering as genuine of a false, fabricated, and forged execution. The facts averred were, that he had forged the signature of a certain James Donaldson to a citation, as witness to the service, and delivered it as genuine; and that, having procured the signature of one John Forrest to a blank piece of paper, he inserted above it an execution of citation. Objections were taken to both charges as laid in the indictment. The Court had no difficulty in repelling the first objection; but on the second charge, they, by a majority, found the libel not relevant. The Lord Justice-General concurred with the majority:—Assuming that the signatures to the execution were



genuine, was the offence averred here a forgery in the sense in which that *nomen juris* was used in the Court of Justice? Forgery was originally tried in the Civil Court, and in capital cases transferred to the Court of Justiciary; only in the middle of last century had a privative jurisdiction on forgery been given to the Court of Justiciary. His Lordship had examined all the cases from 1500 downwards, and could not find a single case to support this charge of forgery. The distinction drawn by Hume was broad and clear. If a messenger returned a genuine execution containing false statements, it was still a genuine writ of the parties who made it. It was a different case from that where what was inserted above was not what was intended. The case of a false attestation by notaries was made forgery by statute. Lord Ivory—was of a different opinion, holding that the offence was relevantly libelled as forgery. In the analogous case of notaries subscribing for a party who could not write, falsehood by them was forgery, although their signatures were genuine. This was a fabricated execution, representing that an *actus legitimus* had taken place, which had not taken place; and the document, as an *actus legitimus*, affected the property of individuals. Lord Deas concurred with Lord Ivory. The other judges concurred in the decision of the Court.

EARL OF KINNOULL v. TODD.—Dec. 15.

*Game Laws—Trespass.*

Lord Kinnoull presented, on the 5th September last, to the Justices of the Peace in Perthshire, a complaint founded on the 1st section of 2 & 3 William IV., cap. 68 (Day Poaching Act), against David Todd, a tenant of his own, for trespassing in pursuit of game without his leave, on the farm of which Todd was the occupant. The defender objected, that he being tenant of the lands in question, there could be no trespass under the Act; and the Justices sustained his objection. Lord Kinnoull advocated the case. The Lord Justice-General delivered the judgment of the whole Court:—It did not appear whether it was set forth in the complaint that Todd was at the time on the lands of which he was tenant; but the objection was taken on that footing, and the fact of his being the tenant of the lands on which the alleged trespass was committed was not disputed. In the case of Smellie, 1 June 1844, the question was raised as to the application of the statute to tenants of the lands on which trespass was alleged to have been committed. The judgment then pronounced by a full bench was against the application of the statute to such a case; and though there was a difference of opinion, still that was a deliberate judgment of the whole Court. They were now asked to pronounce a different judgment, based on the arguments submitted to them, and on the course taken by the Court in certain subsequent cases. One of these was that of the Earl of Selkirk, 14 Dec. 1850, where it was found that the statute was applicable to the case of the farm-servant of the tenant; and it was contended that while the Court in that case found that the servant of a tenant might be a trespasser, the doctrine laid down would extend to a tenant himself. Looking at the case of Selkirk, it did not appear that the farm-servant of a tenant of the lands must necessarily be a trespasser, but only that he might be a trespasser. It could not be known what would have been the ultimate judgment

of the Court if the servant had entered upon the lands in the execution of the agricultural purposes of his master. The case of Smeaton, to which reference had also been made, was not under this statute, but under that of George IV., the objects of which were of an entirely different nature. Neither of these decisions derogated at all from the judgment in the case of Smellie, the authority of which was indeed recognised. Very strong arguments, indeed, would be needed to justify the Court in going back on a judgment which their predecessors had so deliberately pronounced. It would be a bad precedent to overturn such a decision on light grounds. The Court therefore were of opinion, that the present bill of advocacy should be refused.

## Appeal in the Privy Council.

*BELL v. GRAHAM, falsely calling herself BELL.<sup>1</sup>*  
*Scotch Marriage—Foreign—Evidence of Consent.*  
*(8th December 1859.)*

The appellant, John Bell, was a gentleman resident at Appleby, in Westmoreland, and had for many years held the office of clerk of the peace for the county of Westmoreland. The respondent was a person in an inferior station of life, and resided with her brother, who was a shoemaker. It appeared that on or about the 1st of November 1843, when the appellant was forty-three years of age and the respondent was only nineteen, an illicit connection was commenced between them. On the occasion of her second pregnancy, in 1847, certain communications passed between Mr Bell and the brother of the respondent. The result of such communications appears to have been an arrangement that Mr Bell should go through the ceremony of marriage with the respondent. In pursuance of this arrangement, Mr Bell, on the 13th June 1847, proceeded with the respondent and her brother by train to Gretna. On arriving at the Gretna station, which is on the English side, they walked across the border to the toll-house on the Scotch side, where marriages were commonly performed; and, in the presence of John Murray, the keeper of the house, who was there, they went through the usual ceremony of declaring themselves to be man and wife, received the usual certificate, and signed an entry in the register in the following terms:—

“Annan, Parish of Annan, 18th November 1843.  
 “We, John Bell, residing in the parish of Bongate, in the county of Westmoreland, and Elizabeth Bell, residing in the parish of Appleby, in the county of Westmoreland, do hereby acknowledge ourselves to be married persons from the 1st of November 1843; in testimony whereof, we have requested Mary Murray and David Murray to sign this as witnesses to the genuineness of our signatures.”

Disputes having afterwards arisen between them, in December 1853 Mr Bell commenced proceedings in the Consistory Court of Carlisle, in order to obtain a decree of nullity of marriage. The suit came to a hearing in March 1856, when Mr Bell, Elizabeth Graham, and John Murray, who had performed the ceremony, were all examined as to what had taken place on the 13th of No-

<sup>1</sup> Before Lord Cranworth, Lord Kingsdown, Lord Chelmsford, Sir E. Ryan, and Sir Lawrence Peel.

venber 1847. According to Mr Bell, no marriage had ever taken place at all ; the ceremony was a purely fictitious one, and was never meant to have any other effect than that of satisfying the scruples of the respondent's brother, who had threatened to turn the respondent out of his house unless Mr Bell married her. Nothing was said except by John Murray, who muttered something he did not understand ; all that witness did, was to fill up and sign the papers. The respondent denied that her brother had ever interfered in the matter, but insisted that Mr Bell had often promised to marry her, and repeated his promises when she became pregnant the second time. Both she and her brother fully understood, when they went to Gretna, that they went there for the purpose of being lawfully married, and she had no other object nor understanding. He always spoke of the marriage as a good one ; but he subsequently offered her L.30 a year if she would go with him to London and do away with it ; and said that unless she did so he would give her no more money. George Graham, the brother of the respondent, confirmed his sister's statements.

John Murray deposed that he lived at Sack Toll-bar. Remembered performing the ceremony of marriage between Mr Bell and Elizabeth Graham, on the 13th November 1847. Mr Bell had come to him two days previously, and had inquired if a marriage could be dated back, for he had been married nearly four years before at Annan, and his wife was now unwilling to live with him unless she had something to show for her marriage ; that he had been to Annan to find the party who had married him, but could not, as he was gone to America. Witness replied that he had no objection to date the certificate back, but they must go through the same ceremony as other people. On the 13th of November Mr Bell came with Elizabeth Graham to his house, and was married to her in the usual manner. The witness then described the nature of the ceremony.

Mr Cook, advocate, was called on behalf of Mr Bell, to prove the law of Scotland in such matters, and deposed that if the parties distinctly acknowledge themselves to be husband and wife, or accept of or take each other as husband and wife, and at the same time make a declaration to that effect, provided it is done *bona fide* with the intention of contracting marriage, it was sufficient to make a marriage. Such a marriage was irregular, but lawful, and was called a marriage by declaration *de presenti*. It was, however, always competent for the parties to show that the exchange of the declarations was not really for the purpose of constituting a marriage, but *alio intuitu*, for some other purpose ; and if this could be established to the satisfaction of the Court, then, notwithstanding the formal declaration, there was no marriage.

On the 24th day of April 1856, the Rev. Charles James Butler, Chancellor of the Consistory Court of Carlisle, delivered an elaborate judgment, and pronounced sentence in favour of the marriage, which sentence was duly confirmed by the Chancery Court of York. From this Court Mr Bell appealed to the Privy Council. Twiss, Q. C., and Anderson, appeared for the appellant, and cited the following cases :—*Dalrymple v. Dalrymple*, 2 Hag. ; *M'Innes v. More*, 2 Paton ; *Taylor v. Kello*, Mor. 12,687 ; *M'Adam v. Walker*, 5 Paton, 675 ; *M'Lachlan v. Dobson*, 1 Dow, 188 ; *Jolly v. M'Gregor*, 3 W. and S. 85 ; *Cunningham v. Cunningham*, 2 Dow, 502 ; *Stewart v. Menzies*, 8 Cl. and Fin. 309 ; *Lockyer v. Sinclair*, 8 D. 603 ; *Campbell v. Sasson*, 2 W. and S. 319 ; *Hamilton v. Hamilton*, 9 Cl. and Fin. ; *Swift v. Kelly*, 3 Knapp, P.C.C. 257.

Deane, Q. C., and Neish, for the respondents, were not called upon.

Lord Cranworth delivered the judgment of their lordships. In this case we have come to a clear conclusion on the facts, which renders the discussion of difficult points of law unnecessary ; and our decision will, therefore, rest on the facts alone. The following facts we regard as established :—That Mr Bell did represent to Elizabeth Graham that it was his intention to marry her ; that such marriage did actually take place by some proceeding across the border ; that he induced her to accompany him across the border, and to go through the ceremony of marriage, with a view to carry such intention into effect ; that she did actually accompany him and go through the ceremony of

marriage, and that she considered that a marriage had actually taken place between them. It is urged on the part of Mr Bell that, whatever Elizabeth Graham might have thought on the subject, he, Mr Bell, had a very different object in view, which was to enable himself to obtain a certificate of a previous marriage, which had, in fact, never taken place. Whether, if it were the fact that he had, at the time of the marriage, any such intention, the marriage would be invalidated thereby, is a point as to which we do not give any opinion, because it is our clear opinion that, although he might have had the object in view to obtain a false certificate of a marriage which had never taken place, yet he had also, on that 13th of November 1847, a deliberate intention of being married to Elizabeth Graham. It is unimportant to inquire into his motives for endeavouring to obtain the prior certificate; but I may observe, that it struck us all that the anxiety he showed to obtain the prior certificate offered the strongest evidence that he intended a real marriage, because in such case it was important for him to prove to the world that his wife was a virtuous woman. Except for this purpose, I do not see what object he could have had in antedating the certificate. What, then, is the evidence, and how is it shown that *ipsum matrimonium* was contracted? There were three witnesses of the fact; and perhaps it might have been more satisfactory if the wife and son of Murray, who were present, had been also examined; but, as it appears that these parties were in the habit of witnessing upwards of 400 marriages in the course of the year, it would not have been of much value. It might be thought that Murray would be no better witness than his wife or son; but such is not the case, for there were peculiar circumstances which called his attention to this marriage, and fixed it in his memory. There was the attempt to induce him to grant a false certificate, and the statements as to the previous marriage, which led him to doubt whether any such previous marriage had ever been actually solemnized. According to Mr Bell's statement, he went two days previously to Murray, to endeavour to obtain a certificate of the alleged former marriage, but failed in so doing; he afterwards went with Elizabeth Graham, with the same object; no ceremony whatever took place; he took her hand certainly, but he said nothing. Now, contrast this evidence with the evidence of the party equally interested on the other side, and with the evidence of Murray. According to Murray, they joined hands before witnesses; and Murray asked Mr Bell if he took the woman to be his lawful wife, to live together for better or for worse, so long as they should be spared, before God and the two witnesses present; to which Mr Bell answered, "I do." He then asked a similar question of the woman, and received a similar answer. He then said to them, "You have acknowledged yourselves to be man and wife, joined together as one. Whom God joins together let no man put asunder. You have this day declared yourselves, in the presence of God and of these two witnesses, to be man and wife, according to the laws of Scotland." And then he says that Mr Bell put a ring on her finger. It is to be remarked that the woman denied the circumstance of the ring, but it is unimportant, except as a test of the accuracy of the witness. On these facts we have come to our conclusion, and none of us have the least doubt that the account given by Murray and Elizabeth Graham is the correct one; that the parties were married in the ordinary mode in which marriages are celebrated on the border; and that the proceeding was seriously understood, and intended by Mr Bell, as well as by everybody else, to be *ipsum matrimonium*. The evidence is irresistible that, at the time the ceremony took place, both of the parties *bona fide* considered that they were contracting a valid marriage. If this be the case, the circumstance of their not cohabiting together in the ordinary mode is immaterial. Unquestionably, if there had been a reasonable doubt as to the *ipsum matrimonium*, it would have been to be taken into account; but we do not think it outweighs the other circumstances. What may have been the motives which actuated Mr Bell on this occasion, we cannot conceive; but it appears that he was a person holding a responsible situation in the county, under the eye of the magistrates, and there might be motives which would make him wish to marry

and yet keep the fact concealed from the public; but what these motives were is immaterial, if it be the fact that he did actually contract matrimony with the respondent. As to this, we have come to the same conclusion as the Court below, and the appeal is dismissed with costs.<sup>1</sup>

## English Cases.

**CONTRACT.—Penalty—Liquidate Damages.**—Parties bargained for the sale of furniture according to valuation, and the agreement specified a day on which possession was to be given, and provided that, in the event of either not complying “with every particular set forth in the agreement, he shall forfeit and pay the sum of L.50.” *Held* to be a penalty. *Bramwell, B.*—According to the authorities, the use of the word “penalty,” or of the expression “liquidated damages,” in connection with the stipulated sum, is not conclusive as to its character. Notwithstanding the use of the one expression or the other, the scope and nature of the agreement is to be looked at, with a view to see what was the intention of the parties. Although the agreement provides for the doing of various things, yet, if they are all of them of uncertain value, or involve a damage incapable of pecuniary estimate, the sum will be recoverable as liquidated damages, and not as a penalty. But whether I regard this case by the light of the authorities, or view it with relation to the statute, I am satisfied that the stipulated sum is a penalty, and consequently that the plaintiff is entitled only to recover the actual damage he has sustained.—(*Betts v. Burch*, 7 W. R. 546.)

**SALE.—Variance of Quantity.**—Sale of wheat in London, to be shipped in the Black Sea for England; amount “about 2000 quarters, say from 1800 to 2200, at the price of 52s. per delivered quarter free on board at Toganrog, and including freight,” etc. Payment, cash in London in exchange for usual shipping documents. The shipping documents showed a quantity over 1800, but the quantity actually shipped was less. *Held*, that the buyer was relieved, the meaning of the contract being, “unless the quantity on board come up to 1800 quarters, I am not bound to take the cargo.”—(*Tauvaco v. Lucas*, 7 W. R. 568.)

**EVIDENCE.—Pedigree—Hearsay.**—Suit instituted at the beginning of the century to recover L.20,000, taken possession of by the Crown as the estate of Brigadier-General Kayler. The claimants produced a large mass of evidence to make out their relationship, on which *Kindersley, V.C.*, remarked, that gradually, by decisions and statutory enactments, there had arisen a just disposition to consider the rules for shutting out hearsay evidence, which were almost peculiar to this country, as too strict, and modifying and relaxing them. In cases of pedigree, *ex necessitate rei*, unless you admitted such evidence, except in cases of yesterday, it was impossible to arrive at the truth, although there might be a moral conviction of it. Every species was not admitted; but living witnesses were allowed to state that which they had heard certain persons, now deceased, say with respect to the pedigree of their family, they being proved to be *aliunde* members of that family to which the statements related, but they must be proved to be relations by extrinsic evidence, and this Court did not require very strong evidence of their being members. Here there was the evidence of the declarations of deceased persons; but it was said that was a matter of pedigree as to some person's birth, death, marriage, or burial, forming a link, and it was not permissible to produce hearsay evidence of these facts. His Honour thought the evidence was not of that description. In a great number of cases of pedigree the difficulty, the *cruz* of the case, was the identity; not whether A.

<sup>1</sup> From the *Weekly Reporter* of December 17 (vol. 8, p. 98).

married *C.* or died, but whether a particular person was proved to be the same as another person proved to have existed; whither such person came from, where he resided, whether he had gone to India or France; and these were very important in questions of identification, as to make out that *A.* was the son of *B.* On principle, if you once admitted this evidence, you ought also to admit evidence on questions not of pedigree, unless the admission would be dangerous. No doubt there might be danger and mischief in admitting hearsay evidence; at the same time, notwithstanding that it was admitted to get at the truth in pedigree cases, and once having got over the difficulty, why was the admission more dangerous in one case than another? There was some difference of opinion between Lord Truro, the Chief Justice of the Common Pleas, and Lord Justice Knight Bruce, in which his Honour could not help siding with the Lord Justice; Lord Cottenham also differed from the Vice-Chancellor of England; but the result of the authorities was, that there was a growing tendency to admit such evidence, particularly in the case of *Shields v. Bouchier*. The evidence, therefore, ought to be admitted, leaving the question of credibility open. Here the greatest jealousy ought to be exercised, because most of the witnesses were interested. Johann George Khoëler was, his Honour thought, identified with George Frederick Kayler, who was clearly proved to have been the father of the intestate, and the claim had therefore been established. The exceptions must be overruled, and the costs must be costs in the cause.—(*Bauer v. Mitford*, 7 W. R. 570.)

**INSURANCE.—Condition—Suicide.**—A policy of insurance contained a condition that it would be void if the assured died by his own hands, the hands of justice, duelling, or suicide; but, “if any third party have acquired a *bona fide* interest therein by assignment, or by legal or equitable lien for a valuable consideration, or as security for money, the assurance thereby effected shall nevertheless, to the extent of such interest, be valid and of full effect.” During the currency of the policy he became bankrupt, and a few days after committed suicide. Did the creditors take it? Held by Ex. C. they did not. Cockburn, C. J.—“Persons who, as assignees of a bankrupt, acquire an interest merely as personal or legal representatives by operation of law, are not third parties within the meaning of the clause. They represent the bankrupt himself, and simply take his estate for the purpose of distributing it amongst his creditors, and are not such third parties as are intended in the condition, the object of which was to make the policy more valuable by enabling the assured to raise money on it.”—(*Jackson v. Foster*, 7 W. R. 578.)

**MARINE INSURANCE.**—Goods were insured on a voyage to *B.* In Nov. 1854 the ship and cargo were seized and condemned on suspicion of being for the slave trade. In December the assured gave notice of abandonment to the underwriters. Part of the goods, being perishable, were sold, and the residue detained as security for the penalties. The assured appealed to the P. C. against the decision of the Court of Admiralty, and in Feb. 1858 the sentence was reversed, and the goods ordered to be restored to the assured. Upon this the question was, whether the assured could recover against the underwriters as for a total loss. It was held that he could do so, for that the loss was not the less total because the residue of the goods existed in specie at the time of the decree for restitution.—(*Lozano v. Janson*, 33 L. T. Rep. 270.)

**LIABILITY TO INCOME-TAX IN A PARTNERSHIP.**—*B.* was a partner with six others who resided in America, and who there and in other places abroad sold the goods, which it was the business of *B.*, who resided in England, to buy there, and ship to his partners in America. The partnership had a counting-house in England, with the name of the partnership over the door, and there also they had clerks and servants, and a banking account in England, but no money was ever received in England except that sent by the partners from New York. Was the firm liable for income-tax, and to what extent? It was held that it was liable upon the whole of the profits earned by the exportation of

goods from England for sale in the United States.—(*Attorney-General v. Sailey*, 33 L. T. Rep. 275.)

**LIABILITIES OF RAILWAYS.**—In an action under Lord Campbell's Act, it appeared that the accident was occasioned by the defect of a self-acting switch on the line leading into the station at B., which was the property of the B. C. Company. The defendants had a right to use the station, but had not the control of it, or of that portion of the line where the switch was; but there was a gate not far from the switch, and the defendants' servant in charge of the gate was in the habit of looking after the switch, although it was not in his charge. This was held to be evidence to go to the jury of negligence on the part of the defendants.—(*Birkett v. The Whitehaven, etc., Company*, 33 L. T. Rep. 226.)

**LIABILITIES OF TRUSTEES.**—It is the duty of trustees to inform their *cestuis que trust* of breaches of trust committed, and of their right, before taking from them a release; and where the *cestuis que trust* had given receipts and executed releases to their trustees in ignorance of their breaches of trust, those instruments were wholly set aside and the trustees were declared to be personally liable.—(*Lloyd v. Attwood*, 33 L. T. Rep. 209.)

**LIABILITY OF EXECUTOR OF A SHAREHOLDER.**—A company's private Act provided that shareholders should continue liable on any judgment, etc., as if the Act had not passed, and that, after failure to obtain satisfaction from the company, execution might be enforced against the property, etc., of any shareholder, or former shareholder, who was such at the time of the contract made. It was held that the executor of a shareholder who had died before judgment obtained against the company was not liable under this provision.—(*Poole v. Knott*, 33 L. T. Rep. 182.)

**WINDING UP.**—A company is to be wound up whenever three-fourths of its capital shall be lost or become unavailable. It was held that, in estimating this, its stock-in-trade must not be valued according to the probable selling price.—(*Ex parte Hawkins*, 33 L. T. Rep. 188.)

**PRIVILEGE OF A WITNESS.**—A stockbroker was held, in *Ex parte Aston*, 33 L. T. Rep. 229, 7 W. R. 539, not to be entitled to refuse to answer a question put to him, whether he had had dealings in the scrip or shares of a certain company on the ground that "he was advised that the company was illegal, and that he might render himself liable to criminal proceedings or to penalties." It was nothing to say that he was advised of its illegality. The Court will decide whether the reason alleged by the witness is a valid one; the doctrine of Maule, J., in *Fisher v. Ronalds*, 12 C. B. 765, that "the privilege would be worthless if the witness were required to point out how his answers would tend to criminate himself," was not disputed, but it was held to apply only to a case where the witness had given no reason at all.

**CONTRIBUTORY.**—The secretary falsely told B. that he might be appointed medical officer of a company, but that to hold that office he must take a certain number of shares, and that only two medical men would be appointed. B. took the shares, and signed the deed; but afterwards discovered that there were four medical men, and that it was not necessary to hold so many shares. He resigned his office and repudiated the shares; but he was held, nevertheless, to be a contributory, there having been no such misrepresentation as to exonerate him.—(*Re The Home Counties Life Assurance Company*, 33 L. T. Rep. 196; 7 W. R. 540.)

**CONSIDERATION.**—B. was indebted to C. on two bills of exchange, and had a building account against D. At C.'s request, B. gave him this order:—"I hereby agree to authorize D. to pay C. or his order the sum of L.113, 13s., the amount of two acceptances, together with the expenses on the bills and interest thereon, towards my account for building; D. to debit my account with the above money; also C.'s receipt to D. I acknowledge shall be binding between

myself and D. on the contract." At foot D. wrote, "acknowledged," and signed it. It was held that C. could not maintain money had and received against D. on these facts, nor an action on the agreement, as there was no consideration for it.—(*Liversidge v. Broadbelt*, 33 L. T. Rep. 226.)

**COPYRIGHT.**—B., the proprietor of an illustrated weekly periodical, called the *London Journal*, sold it to C. for L.20,000, and covenanted not to publish any periodical of a similar description. Afterwards he published a daily paper called the *Daily London Journal*. This was held to be a colourable alteration of the name.—(*Ingram v. Stiff*, 33 L. T. Rep. 195.)

**RESTRAINTS ON TRADE.**—*Distance.*—In an agreement not to carry on business within a certain distance from a place named, the distance must be measured in a straight line, and not by the nearest practicable mode of access.—(*Duignan v. Walker*, 33 L. T. Rep. 256.)

**TRUSTEE AND CESTUI QUE TRUST.**—*Solicitor and Client—Notice.*—This was an appeal from a decision of the M. R., and the sole question was, which of two purchasers was entitled to priority, according to the doctrine of notice. A legacy of L.10,000 3 per Cents. was, under the will of John Durand, deceased, in 1820, vested in four trustees. On the 5th June 1820, a legatee, entitled to one-fourth share, sold and assigned it to Fletcher and others. On the 26th July 1824, he sold and assigned the same to the present appellant, who immediately served formal notice thereof on each of the then trustees. In 1826, the first purchasers also served formal notice of the sale to them, and stated that they had done so in 1820 through John Corfield, one of the trustees, and also solicitor of his co-trustees, in the matter of the trust. On the retirement of John Corfield in 1824, his son and former clerk, William Corfield, was appointed trustee in his place, and he was one of the trustees in 1824, when the second sale took place. The question now was, whether there had been sufficient notice of the first assignment to enable it to retain priority. The Lord Chancellor said, that the case could be satisfactorily disposed of, on the ground that Durand the trustee had actual notice of the assignment. Nearly forty years had elapsed since the transaction, and there was as much evidence as could reasonably be expected under such circumstances; that Durand had actual notice, even assuming that it was necessary to prove that notice must be given personally. If in a chain of sequence some facts were proved, others might be inferred; and there were in the present case sufficient facts proved to lead to the conclusion that Durand had personal notice, and was fully aware of the assignment.—(*Re Durand's Trusts.*, 8 W. R. 33.)

**WILL.**—*Legacy—Nephew and Niece and Grand-Nephew and Grand-Niece.*—A bequest to A. and B. as "nephew and niece," although in the subsequent part of the will the testator alludes to them as the children of his nephew, held not sufficient to indicate that in a subsequent bequest to "nephews and nieces" the testator intended that his grand-nephews and grand-nieces should be included. The Master of the Rolls said—"It appears to me that there are in the present case persons answering the description. The testator, after certain bequests, directed his houses and premises in Jane Street, Workington, to be sold, and the proceeds, after paying a certain debt, to be divided into three shares; that is to say, one-third to his niece, Ann Graham; one-third to his sister, Ann Jackson; and the remaining one-third to his nephew and niece, John and Sarah Pearson—but who, in fact, were his great-nephew and great-niece. I am of opinion it was a distinct mode of designating those two persons, and that the testator had no intention of extending the meaning of the terms nephews and nieces to a general class. I adhere to the rule laid down by Sir James Wigram, to abide as much as possible by the exact words of a will, and I find here in this will two persons that answer the description. I am of opinion, therefore, that 'nephews and nieces' designate a particular class, and that the *onus probandi* lies with those who desire to extend the meaning of these terms. Nevertheless, I hold that the mere fact of the testator's designating these two



persons incorrectly is not sufficient to extend the meaning of the words 'nephews and nieces' throughout the will, and accordingly there will be a declaration to that effect."—(*Thompson v. Robinson*, 8 W. R. 34.)

**PARTNERSHIP.—Construction of Agreement.**—G. L., a retiring partner of the firm of B. and Co., applied to G. and Co., bankers, for a loan of L.20,000 on the security of his share in the partnership, and informed them by letter that the amount of his share might be taken at about L.25,000; and that he was informed by W. B., his former partner, that part of the balance at credit with C. L. and Co., of which G. L. was a member, on account of B. and Co., would be appropriated towards payment thereof, and that he would authorize W. B. to pay the amount to G. and Co., and he thereby bound himself to give G. and Co. a full and perfect lien therein. Afterwards, W. B. wrote to G. and Co., through G. L., stating that they had instructed C. and Co. to transfer to them L.5000, the surplus partnership assets of B. and Co., in their hands, and engaging to pay the remaining balance of G. L.'s capital. G. L. sent to G. and Co. a promissory note payable to the order of C. L. and Co., with the letter of W. B., as a collateral security, and the L.20,000 was accordingly advanced. The firm of C. L. and Co. became insolvent, and the promissory note when due was presented and dishonoured. G. and Co. filed a bill against the surviving members of the firm of B. and Co., and the representatives of a deceased partner, who claimed to be allowed to deduct the L.5000 in the hands of C. L. and Co., referred to in the letter. *Held*—That the plaintiffs were equitable assignees of G. L.'s share, and were entitled to recover the whole amount without deducting the L.5000 alleged to be in the hands of C. L. and Co.—(*Glyn v. Hood*, 8 W. R. 37.)

**POWER.—Appointment.**—Testator gave to A. a power of appointing L.3000 3½ per cents. reduced "amongst such of my children as shall be living at the death of A. in such shares and proportions as A. shall by will appoint." A. by will gave to two of testator's children L.10 each, and to the third "all the residue of my property to be found in the 3½ Reduced Bank Annuities (now reduced to 3½ per cent.), and all other property whatsoever and wheresoever, to be by her, the said Charlotte Elizabeth Dixon, possessed and enjoyed absolutely during the term of her natural life, and to be disposed as she shall think fit at her death." *Held*—That the gift to Mrs Dixon was a valid exercise of the power; and that she was entitled to the residue absolutely. Wood, V.C.—"The main question, however, was, whether the power of appointment was well executed; and then, whether under the appointment Mrs Dixon took a life interest, with a power of disposition by will, or an absolute interest, subject only to any disposition that she might make. Here there was the additional circumstance, that the power did not justify the exclusion of any individual. L.10 was given to each of the two other objects of the power, and all the residue to the only remaining object. There might be some question as to whether these were specific gifts of L.10 out of the stock, and then a subsequent definite gift of all her other property; but he confessed that it appeared that he was justified, under the two circumstances of the preceding gifts of L.10, and the residue to the only other object of the power, and of this singular description of the fund (so much more appropriate to the property which had been changed, than to property hereafter to be invested in funds which had long since ceased to bear the name of 3½ Reduced), though with some hesitation, that she meant to operate upon her power; it must, therefore, be held, that the power had been well exercised. Upon the other question, as to the amount of interest taken by Mrs Dixon, he thought that there was no doubt. The property was given to her for her life, absolutely to be disposed of; and he was, therefore, not justified in inserting the words 'by will.' Mrs Dixon was, therefore, entitled to the residue of the fund absolutely."—(*Re David's Trusts*, 8 W. R. 39.)

THE

# JOURNAL OF JURISPRUDENCE.

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## PROFESSIONAL "CLOTHES-PHILOSOPHY."<sup>1</sup>

Still more touching was it when, turning the corner of a lane, in the Scottish town of Edinburgh, I came upon a signpost, whereon stood written that such and such a one was "Breeches-Maker to His Majesty;" and stood painted the effigies of a pair of leather breeches, and between the knees these memorable words, SIC ITUR AD ASTRA.—*Sartor Resartus*, 8d Ed. p. 315.

As MONTESQUIEU wrote a *Spirit of Laws*, a modern essayist has proposed to indite a "*Spirit of Clothes*." For neither in tailoring nor in legislating is the element of chance regarded by the philosopher, who in every field of human ingenuity seeks only for illustrations of the uniformity of the primary laws of causation. The secret of the fascination which resides in official costumes and other symbols of dignity may baffle the penetration, and ever elude the grasp of the discoverer; but the fact has been notorious in all ages. We need not revert to those remote epochs which bear witness to the mystical efficacy of Jacob's hairy covering, on which the fortunes of the younger branch of the Abrahamic family, and through them the welfare of the entire human race, were said to have depended. Yet can we read without emotion of a Roman emperor who was thrown into hysterics by the news that a subaltern had assumed the purple, or is it possible to repress a smile on perusing the story of that episode in Lord Eldon's career, when it was discovered that the Great Seal, the talisman of authority, the ark of the covenant of the British constitution, had been filched from the custody of its illustrious worshipper and hierophant?

<sup>1</sup> Report of the Committee of Faculty on Silk Gowns, and Pleading within the Bar. 19th Nov. 1859. Address by Sheriff Alison to the Faculty of Procurators of Glasgow. 1858.

Various, indeed, and important are the functions of costume ; and not the least striking is the illusion with which it invests the wearer. No Aladdin transformation is half so wonderful as the revulsion of feeling experienced on beholding your intimate friend or, it may be, your bitterest enemy, for the first time attired in the habiliments of official masquerade. Look at that elderly gentleman on the bench. But yesterday, the individual in prison-dress standing before him would have passed him in the street without notice, or (O horror !) picked his pocket without compunction. Now, we will suppose, the elderly gentleman resplendent in satin and scarlet brocade, politely informs his fellow-worm that he deserves to be hanged, yet, such is the clemency of the law, that he will give him another chance of reformation, and therefore the sentence of the Court is limited to twenty-one years penal servitude. Prison-dress listens in dumb surprise, and goes his way, wondering at the benignity of the dispensers of justice. Or take another case. Two men, honourable gentlemen both, we will suppose to have entered the world political, charged with the mission of entertaining their friends by publicly abusing one another. A. dons a mantle of silk, or encases his limbs in the thing called Windsor Uniform ; and forthwith, in the plenitude of his generosity, he calls B. *his friend*. Old injuries and animosities are at once buried in oblivion. Thus are friendships cemented and antipathies corrected by the magical, all-pervading, humanizing influences of costume.

To penetrate the disguises of character, to unlock the secret springs of influence, and by such artifices as experience teaches, to establish the supremacy of superior culture over weaker minds, have long been regarded as part of the legitimate pursuits of the legal profession. As the analyst, by purely conventional forms of reasoning, investigates the profoundest problems, and in a few combinations of alphabetic characters expresses the mutations of all material phenomena ; so the lawyer, with the aid of certain conventional phrases, customs, and formulas, sanctioned by usage and consecrated by ancient tradition, controls the whole mechanism of society, and without a fulcrum sets the world in motion. It need not, therefore, excite surprise, that the lawyer thus intimately conversant with the forms, rather than the realities of things, should display a proper and philosophic appreciation of the true worth and inherent dignity of clothes.

Two of the branches of the profession have lately been moving in

the matter of professional costume,—the Faculty of Advocates, and certain of the Societies of Procurators in the provincial Courts. We shall give to the proceedings of the Faculty the precedence which their position entitles them to claim.—Shortly before the advent of the last Conservative administration, a letter was laid before the Faculty from Mr Moncreiff (then engaged in London with his parliamentary duties as Lord Advocate), proposing to confer the rank and privilege of Queen's Counsel on a certain number of the Scotch Bar, by issuing patents of precedence in their favour. As was due to the Bar, his Lordship at the same time disclaimed the intention of innovating upon established customs, unless his propositions were consonant with the wishes of the profession. The matter was referred to a committee; and on considering their report, the proposed institution of Queen's Counsel was approved of, but by a majority so small, that the Faculty did not feel justified in accepting the offer of the Lord Advocate. It has been surmised, not without reason, that political motives had their usual influence in modifying this decision of the Faculty. At all events, a large proportion of the successful minority belonged to a different school of politicians from Mr Moncreiff. Be this as it may, the Faculty were not long in discovering that they had proceeded too hastily or too far. Although still repudiating the interference of the Crown, it was determined that the Faculty could give precedence as senior counsel by a resolution of their own body, and that not only to specified individuals, but *per aversionem*. And accordingly, on the retirement from office of the present Lord Advocate and Mr Maitland in 1858, it was resolved on 20th March, "That those of their number who may have held either of the foresaid offices (the offices of Lord Advocate and Solicitor-General), shall have precedence next after the Lord Advocate, Dean of Faculty, and Solicitor-General for the time."

Under this resolution, the gentlemen we have named, and also the late Lord Advocate and Solicitor-General, are entitled as a personal privilege to seniority next after the Crown Counsel and Dean of Faculty for the time being.

So far, the proceedings of the Faculty were unexceptionable. But when, in order to carry out this arrangement in a liberal spirit, they proceeded to appoint a committee with a view to authorizing the ex-Advocate and ex-Solicitor to wear silk gowns and plead within the Bar, we apprehend they committed a grave mistake. We shall not allow ourselves to entertain a moment's hesitation with respect

to the real efficacy and value of silk gowns. As professed clothes-philosophers, we will repel every lurking dubiety on the matter, and confront the world in the profession of a bold and unfaltering orthodoxy. These indeed are not the times for seeking to cast discredit on the lustre of the cloth. Is it not notorious that, within a period that shall be nameless, gentlemen modest enough to abstain from the affectation of ability, and too destitute of local connection to have attained by means of it a practice worth L.500 a-year, have, as soon as they were appointed Crown Counsel, stepped at once into the receipt of a handsome professional income? Let not the too sceptical reader suggest that the reputation of enjoying the confidence of the Crown, and the influence which the possession of public patronage implies, had anything to do with the prosperity of these dignitaries. Depend upon it, the whole secret of success lay in the costume; the dress, from cocked-hat to shoe-buckles, the dress conjunctly and severally, in its *tout ensemble* and plenitude of detail—this alone would suffice to impose upon the multitude.

It has been gravely maintained by English jurists, that if a stranger should surreptitiously attach the Great Seal to a patent of nobility, the title would be good, although the offender would be liable to a prosecution for felony. We are equally confident that a barrister wearing by counterfeit authority the garb which royalty alone can prescribe, though he might be chargeable with disrespect to his sovereign, would reap an immediate reward in an enhanced reputation for ability and learning, and a corresponding accession to his practice. Of course we are only speaking hypothetically; for though if the matter had been supposed to rest on consuetudinary right, there is no saying how far the Faculty might have gone in vindication of their assumed privileges, in point of fact the proposed innovation was given up after it had been ascertained that the legal costume of the country was regulated by statute. In the able Report of the Committee of Faculty, of which Mr Fraser was convener, a variety of interesting details will be found relative to the costume worn at different periods of our history, and the origin of the privilege of speaking within the Bar. Suffice it to say, that by the statute of 1609, c. 8, the regulation of the costume of all judges, civil, criminal, and ecclesiastical, as also "advocates, lawyers, and all others living by law and practice thereof," was referred to His Majesty James VI., who by proclamation, dated 30th January 1610, authorized the use of the existing dress worn by judges, and also

directed "that the advocatis, clerkis of the Sessioun and Signet, sall haif their gownis of black, lyned with some grave kind of lyning or furring." Patterns of the different robes were also sent by the King, of which drawings are preserved in the Lyon Office. Among these is the silk gown of the King's Advocate, which is similar to the full dress gown worn at the present day. On one point only we feel compelled to differ from the conclusions of the Faculty Committee. If we correctly apprehend the import of the concluding paragraph of their Report, they appear to have considered that, inasmuch as the existing dress was prescribed by statutory authority, nothing less than an Act of the Legislature can change it. With all deference to the Committee, this is mere pedantry. The Crown is the recognised fountain of all honours, dignities, and distinctions. We have outlived the time for discussions on the prerogative of the sovereign in her "political" capacity; and there are few who would wish to see the Crown deprived of any relic of regal authority which may still remain to it. No constitutional lawyer will deny that the right of conferring decorations and instituting orders belongs exclusively to the sovereign, who moreover may prohibit the wearing of such badges when conferred by a foreign government. We are not such casuists in sartorial philosophy as to be able to distinguish between the authority entitling a subject to wear a ribbon, and that which is required for the adoption of an embroidered dress. The fact that the Solicitor-General wears a silk gown without parliamentary authority, is against the theory of the Committee; and we think it would have well become the Faculty expressly to recognise the *jus coronæ*, in regard to a right which can nowhere be vested with such propriety, as in the office of the most exalted personage in the realm.

While on the subject of costume, it would be unpardonable to omit all reference to the recent assumption of professional attire by a few of the provincial bodies. We have already seen that the right to wear the gown as a symbol of professional status, is among lawyers confined to *Advocates and Writers to the Signet*. The drawings before alluded to, show that the wig was worn by the Bar alone. We may mention, however, for the benefit of our friends in the country, that the professor's gown may be worn as of right by all graduates of universities; the law on this point recognising no distinction between professors and other graduates. Now that the standard of education for the local bars has been

raised so high, there must be many in that branch of the profession who are either graduates or well qualified to take degrees. The number so qualified is increasing ; and if it is thought desirable that procurators in the Sheriff Courts should adopt a distinctive costume, we can see no impropriety in those gentlemen who are members of a university wearing the dress pertaining to their degree, as is done in the English Ecclesiastical Courts, where the black robes and crimson hoods of the doctors present a picturesque appearance. It is not unusual, we believe, among members of the local profession, to make the decadence of the national Bar a topic of conversation. It seems to be assumed, because our Jeffreys, Cockburns, and Rutherfurds are numbered with a past generation, that there are no longer any eminent pleaders in the profession. We, who have sat for hours entranced by the commanding eloquence of Inglis, and still listen with pleasure to the graceful periods of Maitland and Moncreiff, and the cogent reasoning and felicitous illustrations of Young, may be pardoned for entertaining a different opinion. It happens, also, that two of the gentlemen we have named, who are or were members of the most critical assembly in the world, have been very favourably received, although not pretending to take rank with the leading debaters of the House of Commons. And let it be remembered, that in that House such men as Palmer, Bethell, and Kelly take but a secondary rank. However, if it must be assumed that all learning, eloquence, and genius have departed from the Bar of Scotland, perhaps it is well also that their professional dress—which in common with the Bar of the sister kingdoms they have worn exclusively for nearly three centuries, and which hundreds of their number laid down rather than submit to usurpation—should be taken from them and shared with others who have inherited everything else that was wont to be distinctive of the Faculty. For what are clothes but visible emblems of man's spiritual nature ; and how valueless is the symbol when the animating presence is departed ? We could never look at the cast-off suit of a great character without a touch of sadness, akin to that experienced by Hamlet in turning up the skull of his old companion. No smile of intelligence, no looks of defiance, emanate from beneath that vacant head-dress. The coat-arm is stretched out, but no longer in graceful accompaniment to the voice of the speaker ; the waistcoat shrinks not with emotion, nor expands with the generous impulse of humour or kindly feeling. Or it is like the flag of a disbanded regiment—now a tattered rag—once

the symbol of duty and of brotherly union, an incentive to honourable exertion, hallowed by the memory of a thousand triumphs and inscribed with names illustrious in history.

Apart from the traditionary respect which is accorded to any outward memorial of past greatness, there is nothing in the style of the forensic garb to recommend it, either on the score of comfort or utility. The wearer of a wig is too often a martyr to headaches, and is liable to become prematurely bald. The gown is difficult to keep on, and restrains most provokingly the motion of the hands both in writing and in addressing the Court. He must be a very modest, or else a very vain man, who thinks his appearance is improved by the use of either. In ancient and lawless times, the adoption of a professional garb may have been useful in securing to the wearer that respect which learning and eminence do not always spontaneously command. Nay, is it not probable that a gown would be received as presumptive evidence of familiarity with literature, thus entitling the wearer to "benefit of clergy" and consequent immunity from hanging? But in the present sceptical age, such adjuncts to dignity are fast losing their value; and now that the costume of the Bar is no longer distinctive, an excellent opportunity presents itself for laying it aside altogether. Nobody thinks the less of the judgments of the House of Lords because they are delivered by men destitute of the adornment of judicial robes. Mr Carlyle, indeed, makes merry with the conceit of a "naked Duke of Windlestraw addressing a naked House of Lords;" and sagely observes that imagination, choked as in mephitic air, recoils from the contemplation of such a spectacle. But we are not proposing any such revolutionary change, nor even a return to that primitive costume of "a blanket twelve feet in diagonal," with an aperture for the head, which the same author elsewhere recommends. Whatever of dignity or comfort may be associated with black cloth and fine linen, we would still retain and zealously defend, as part of the privileges of the Faculty. A shirtless brother, or worse still, a brother whose shirt has "once been white," we would cut off unrelentingly, in the face of all the people. Nor do we think the forensic debater would have cause to regret the loss of monkish habiliments, and the resumption of that ordinary attire which appears to be quite compatible with the choicest efforts of living eloquence in the senate, the pulpit, and on the hustings.

If, however, the costume is to be retained, it would be desirable



that the minds of our brethren in the country should be set at rest regarding this matter, and that each community should no longer be left to follow the devices of their own imagination. Why is it, we would respectfully inquire, that the project of a convention has not hitherto been mooted, or at any rate an association of lawyers of every grade, through which the collective sartorial wisdom of the country might be brought to bear upon so important a subject? Should such a scheme find favour in the profession, we undertake that the weight of editorial sanction will not be withheld, if necessary, to strengthen their hands for the task. Nor do we apprehend, if legal sanction were desired, that the Lord Advocate would refuse to set the royal prerogative in motion were the matter properly represented to him. Yet, on the other hand, a somewhat general and indefinite form of sanction would probably, in these critical times, be thought most consistent with the dignity of a royal proclamation; and thus a margin might still be left for construction and the subtleties of *contemporanea expositio*. After all, a code of regulations by some central professional authority (perhaps the Court of Session) would appear to be necessary; and in illustration of the advantages of the plan, we beg to subjoin, as a specimen of the sort of rules we would recommend, a short extract (slightly altered) from the authority already alluded to:—

[ACT OF SEDERUNT.]

“1. Coats should have nothing of the triangle about them; at the same time, wrinkles behind should be carefully avoided.

“2. No license of fashion can allow a man of delicate taste to adopt the posterial luxuriance of a Hottentot.

“3. There is safety in a swallow-tail.

“4. The gown should not be long-sleeved; the collar also is an important point—it must be massive and well scoloped out behind.

“5. Starch is recommended; but gentlemen of apoplectic habit may obtain a dispensation, on production of medical certificates.

“6. It is not permitted to mankind, except under certain restrictions, to wear tweed waistcoats.

“7. Regulation trousers ought to be discarded.”

To be serious, we would desire, with all possible respect, to tender to the gentlemen of the local bars the same advice which, with greater latitude of remark, we have ventured to submit to their Edinburgh compeers. Let each individual procurator stow away

his forensic costume in the inmost recesses of his wardrobe, and dismiss the whole subject from his mind, satisfied that a civilian is never more respectable than when attired in the ordinary habiliments which belong to his rank in society. There may be some excuse for clinging to an obsolete habit when prescription has surrounded it with a halo of respectability, and custom—or say, the express authority of statute—has rendered its use obligatory. But the profession may rest assured that any extension of caste distinctions is a step in the wrong direction, and is likely to lead to a reaction in public sentiment, which will speedily consign the entire paraphernalia of judicial pageantry to merited oblivion. Already we can see clearly, as in prophetic anticipation, the whole train of consequences, from the first inception to the final catastrophe, when the Presidents of our Chambers of Commerce (now become *Tribunaux de Commerce*), wearing the “bonnet rouge,” attended by a posse of constables as messengers-at-arms and carrying for insignia a sheaf of small-debt decrees, shall pace the echoing halls of the Parliament House, and at the words “Take away that bauble,” the venerated mace of the Court of Session, with all the learning, dignity and worth which it symbolized, will be numbered amongst the things that were.

The moral of these random speculations will not be mistaken by the candid and courteous reader. If our opinions should appear sometimes inconsistent, and our doctrines tinged with obscurity, he will please to remember that the Clothes-Philosophy is yet in its infancy; and that similar charges have been maintained, with some show of success, against sciences of graver repute. We desire not to cast ridicule upon established usages; but we would deprecate the march of the antiquarian spirit, when it takes the form of devotion to such trivial matters as titles and costumes. The waggish tailor, whose novel application of an ancient aphorism is celebrated in the quotation prefixed to our essay, understood the weaknesses of human nature. Yet though imagination, yielding to the mad suggestion, might mount its Pegasus and, cased in impenetrable buckskins, soar to celestial altitudes, we hesitate to affirm that the constellations will ever have cause to start affrighted from their spheres by the appearance above their crystal battlements of such a sublunary portent as a Paisley procurator in a wig and gown.

## LAW REFORM—SUMMARY APPEAL FROM SHERIFF COURT.

It cannot be denied that the greatest success in recent legislation has been the Sheriff Court Act of 1853. The reform it effected was complete and sweeping. It changed not only the forms of process in use in the inferior courts, but, in some respects, the sort of talent requisite for the successful conduct of business on the part of the Sheriff Court practitioners. The statute was therefore an experiment, the result of which was watched with some anxiety; but it has now stood the test of seven years' experience, and the longer it is known, the more is the sound policy of its provisions thoroughly realized. The country writers, with remarkable readiness, adapted themselves to the altered circumstances in which, without any previous preparation, they were suddenly placed. The higher salaries provided by the Act secured the services of an entirely new and superior class of men for the office of Sheriff. In short, no tribunal was ever more popular with the public than the Sheriff Court as now constituted. The secret of this popularity is the despatch with which a case is heard and determined. The introduction of the minute of defence was a violent inroad on the traditional prejudices of Scotch lawyers in favour of these ponderous and elaborate written pleadings—condescendences, revised and re-revised—representations and memorials—which formerly clogged the wheels of the judicial machine. But, in spite of this circumstance, it has on the whole worked so well that the opinion is beginning to be entertained, that in many cases it might with advantage be introduced into the forms in use in the Court of Session. We believe that the greatest vice of Scottish law is the style of the *Record*; and no Bill for the reform of the Court of Session will be complete which does not remove this great barrier in the way of the Court and the parties getting at the real question involved in the suit. Prepared on a hypothetical view of the facts, scrutinized and discussed as irrelevant—sent back to the Outer House for amendment—it plays for a while the game of battledore and shuttlecock between the Outer and Inner House, till it is finally superseded by that which the parties should commence with at the beginning—an inquiry into the *facts*.<sup>1</sup> From

<sup>1</sup> We must admit, however, that some improvement has been effected in the forms of process, since the period of the famous cause described by the innkeeper in the "Antiquary"—"as a ganging plea that my father left to me, and his

this unfortunate feature of our system the inferior courts are now, in a great measure, happily free. A suit in the Sheriff Court now generally resolves into the questions which arise on the proof as it is taken by the Sheriff. It is a species of Jury Trial without a record, and the saving to the parties in time and money is almost beyond calculation. As a consequence, there has been a large increase of business; and, in short, the functions of the Sheriff Courts were never discharged with more satisfaction to the public or advantage to the practitioners.

But in this Act of 1853 there is a most unfortunate provision, which has been long a puzzle to every lawyer in the kingdom. No one can tell how, when, or where it got into the original draft of the statute, or of whose legislative skill and statesmanlike forethought it is the striking memorial. No noisy agitation heralded its enactment—no one wanted such a clause. But there is the Act with this hideous blot standing on its face; and to this day—to the discredit of the profession be it spoken—standing unrepealed. It is sec. 22, and is in these terms—

“It shall not be competent, except as hereinafter specially provided, to remove from a Sheriff Court, or to bring under review of the Court of Session, or of the Circuit Court of Justiciary, or of any other Court or tribunal whatever, by advocacy, appeal, suspension, or reduction, or in any other manner or way, any case not exceeding in value L.25 sterling, or any interlocutor, judgment, or decree pronounced, or which shall be pronounced, in such cause by the Sheriff.”

The reader will observe the remarkable fecundity of expression which characterizes the draughtsman of the above section of the Act. The expression, “the Court of Session,” etc., “or any other Court or tribunal whatever,” is only equalled by the enumeration of all the known modes of appeal, with the addition of the words, “any other manner or way.” Thus he has succeeded in most effectually preventing the review of every case under L.25, how-

father afore left to him. It is about our back-yard. Ye'll maybe ha'e heard of it in the Parliament House—Hutchinson against Mackitchinson; it's a weel-ken'd plea; it's been four times in afore the fifteen, and de'il onything the wisest o' them could make o't but just to send it out again to the Outer House. O it's a beautiful thing to see how lang and how carefully justice is considered in this country.”\*

\* *Antiquary*, Vol. I. chap. ii.

ever unjust the decision, or whatever the ignorance or caprice manifested by the judge.

The clause has led to a remarkable anomaly. By the 31st section of the Small Debt Act of 1839, a limited appeal is given to the Circuit Court against the decisions of the Sheriff in Small Debt cases. These appeals, it is declared, shall only be competent "when founded on the ground of corruption, or malice and oppression on the part of the Sheriff, or on such deviation in point of form from the statutory enactments as the Court *shall think* took place wilfully or have prevented *substantial justice being done*, or on incompetency, including defect of jurisdiction, of the Sheriff." This provision, which at one time extended only to cases under L.8, 6s. 8d., is now by the Sheriff Court Act of 1853 extended to all cases under L.12. So that, reading the clause with sec. 22 of the 16 & 17 Vict., c. 80, these anomalous consequences follow: There is a limited appeal in all cases below L.12; there is none whatever between L.12 and L.25 (see *Aitken v. Learmonth*, 2 Irv.). It has truly been observed, that under these enactments a Small Debt judge is the only utterly irresponsible man in this country. Under our admirably balanced constitution, the ministry of the day is controlled by the House of Commons—the House of Commons by the constituencies—the constituencies by the press and public opinion. As to the judicial establishments of the country, every word that falls from a judge of the Supreme Court is uttered with the consciousness that not impossibly it may be criticised, distorted, perverted, or ridiculed at the bar of the House of Lords. But a Small Debt judge may snap his fingers at Queen, Lords, and Commons. If he is ever written down an ass, he exclaims, after a recent eminent precedent, with perfect self-satisfaction, that he "never reads the rubbish contained in newspapers." Thus it has arisen, that day by day and year after year there is every day more legal iniquity practised in most Small Debt Courts, than characterizes the proceedings of all the other courts of the kingdom for years together.

And the Sheriffs are not to blame. We do not mean to insinuate anything of that kind. But, as Lord Deas observed the other day—"The Sheriffs sitting in their Small Debt Courts don't do justice, because *they can't*." Look at the mass of business which they have annually to dispose of: the following figures are taken from Mr Cowan's Return of 1857:—

	Aberdeen.	Argyll.	Ayr.	Banff.	Berwick.	Bute.	Caithness.	Clackmannan.	Cromarty.	Dumbarroon.	Dumfries.	Edinburgh.	Elgin.	Pife.	Forfar.	Bladdington.	Inverness.	Kincardine.	Kintore.	Kirkcudbright.	Lanark.	Linlithgow.	Nairn.	Orkney.	Peebles.	Perth.	Renfrew.	Ross.	Roxburgh.	Seikirk.	Shetland.	Stirling.	Sutherland.	Wigton.
Total No. of Cases Stud for .....	3433	752 2936	683	195	586	507	418 53 1372	471 4446	513 1294 1984	361	700	844 53	444	24 0668	475 53 90	100 1182 3112	838	407 77	124 1466	331	385													
No. of such Cases not exceeding L.8. 6s. 8d. ....	3007	599 2631	591	179	517	441	382 41 1222	408 3670	437 1139 1668	322	573	287 52	348	21 194	406 46 79	92	972 2636	706	870 74	110 1266	292	310												
No. of such Cases above L.8. 6s. 8d., and not exceeding L.12.....	426	153 286	92	16	69	66	36 12 150	63 776	73 155 316	39	127	51 11	87	2 872	69 7 11	8	160 476	99	87 8	14 180	89	73												
Decrees in Absence.	1404	322 1436	249	71	194	176	191 7 729	135 2174	225 453	886	183	243	149 29	155	14 056	238 18 20	53	609 1512	332	146 31	91	874	130	110										
Decrees in Foro .....	604	191 497	130	47	214	82	151 22 336	88 965	158 345	856	83	118	57 16	81	4 900	227 19 37	22	147 880	259	93 46	9	263	74	111										
Dismiss or Absolve.	461	142 316	72	13	59	68	35 10 87	248 423	115 130	339	85	36	35 4	196	2 314	129 11 14	8	312 502	133	27 6	13	163	127	45										
Deserted at Hearing.	480	—	458	190	56	119	161	41 14	190	—	489	15	252	231	15	144	100	—	—	—	2 796	—	5 8	7	—	217	28	76	1	11	156	—	8	

It will be seen that in Lanarkshire there are over 24,000 cases raised every year in the Small Debt Court; and in other counties in proportion. It is perfectly true that many of these cases result in decrees in absence; but still the spectacle is frequently to be seen in Glasgow, of the Sheriff beginning at ten in the morning to a roll of from 200 to 300 cases.

This mass of business is, however, not the only evil. Patience and attention might enable a conscientious man to get through it in course of time. But with the perverse policy which has marked the whole of our legislation on this subject, Parliament has deprived the judge of all chance of his doing so. The Sheriff's difficulty in the Small Debt Court is not in deciding the case, but in finding out what the case is about. Two ignorant rustics, or say, a pair of tradesmen's wives, are suddenly placed in what it is not too much to say is the most trying situation of their lives. It is needless to say that between the two it is impossible to make out an intelligible story. They are either both unable to express themselves clearly, or one bolder and, as a consequence, less scrupulous than the other, profits by the perturbation of her opponent. A simple solution of the difficulty would be the employment of a person whose business it is to know the laws, who is familiar with the methodizing and arrangement of facts, and who sees at once what is essential to the case, and what is not. But the law has expressly forbidden recourse to any such assistance. By sec. 14 of 1 Vict., c. 41, it is enacted that no procurators, "solicitors, nor any persons practising the law, shall be allowed to appear or plead for any party without leave of the Court or special cause shown; and such leave, and the cause thereof, shall in all cases be entered in the Book of Causes to be kept by the Sheriff-Clerk."

A liberal interpretation of this clause has saved the County Courts from all the disastrous consequences which it is calculated to produce. In many parts of the country it is practically repealed, because it was found impossible to do without the assistance of lawyers. This shows, however, wherein the Small Debt Act has failed. It was conceived in too jealous a spirit of lawyers. The theory on which it proceeds is, that the parties must be entirely left to themselves; that they should have one hearing of their case, and be done with it; and that the existence of the first condition is absolutely essential to the other. No principle was ever more false; none ever so completely disproved by experience. The policy of

providing for one hearing on the *facts* of a case was in itself perfectly sound. We have before observed<sup>1</sup> that justice, to be effectual, must always be obtainable at a cost bearing no disproportion to the value of the subject in dispute. We must draw the line somewhere, below which we must sacrifice the quality of the justice administered in return for the cheapness and despatch with which it is obtained. The Act rests on this basis. It was mainly designed to enable tradesmen to recover their accounts; so that, after a poor man was deep enough in their books, they might have it in their power to sell him up without either much trouble or delay. The fact was overlooked, that a claim competent in the Small Debt Court may be a fortune to a poor man; and that under the form of a Small Debt suit, questions not only of the greatest legal difficulty, but involving in reality no inconsiderable pecuniary value, may frequently present themselves for decision. The right of a pauper to aliment,—raising perhaps one of the nicest questions in the law of settlement,—the right to levy a toll, or the right of a public board to impose an assessment—may be all competently tried under a Small Debt summons. The very last case to which public attention has been turned is a good illustration of the importance of this branch of the Sheriff's jurisdiction. The owners of a Dundee whaler promised their crew so much of the oil they got, on their return, in addition to certain monthly payments in money. The money was paid; but as the ship, after capturing a number of whales, was wrecked in Davis Straits, they refused them anything in respect of the blubber they had secured. The loss to the owners was covered by an insurance on "success;" and the men felt it to be a grievous hardship that their employers should reap the fruits of their daring and endurance, when they received no share of the spoil. The question was tried in the form of a Small Debt summons at the instance of one of the crew; and, after an imperfect discussion of the case, he obtained decree in his favour. As between the pursuer and the defenders, the sum involved was L.12 only; but as between the crew and the ship, the decision affected nearly L.800. The legal question raised was one of great nicety and difficulty; and yet the law provides no possible form of ascertaining whether the law laid down by the Sheriff was well or ill founded.

Yet there are individuals to be found who gravely propose that

<sup>1</sup> 2 J. J., p. 13.



this evil, instead of being abated, should be aggravated. The shopkeepers of our large towns wish to have their grasp extended, so as to reach a more respectable class of defaulters. They seek an extension of the Sheriff's Small Debt jurisdiction to L.25 or L.50. To the adoption of the forms of the Small Debt Court in all cases under that amount, we see no possible objection. But this can only be allowed under the two following conditions, which, from inquiries we have made, would, we believe, be acquiesced in by the great majority of the most respectable among the class to which we have just referred. The conditions are,—(1.) The admission of *professional assistance*; and (2.) the granting of an *appeal*, not on the facts, but *the law* of the case.

In cases out of the Small Debt Court, the delay and expense of litigation mainly arise from causes connected with the *facts* of the case. The correspondence with the country agent, the enrolments and motions in the Outer House, connected with the making up of the record, involve the client in an expense to which the cost of the argument is but a trifle. Now, if a machinery could be provided for the adjustment of a case, setting forth all the facts necessary to a decision of the points of law involved, an appeal would obviously be a simple and inexpensive affair. If the parties cannot agree on that subject, make it compulsory on the judge to state the case for them, setting forth at the end the question of law on which the opinion of the Court above is required. The idea is not our own. A form of review of the above nature has been in operation in England for several years, and is, amongst all the Law Reforms of the last decade, that which has given the most unqualified and universal satisfaction. To no class has it proved more acceptable than to the counsel and attorneys practising in the three superior Courts of common law, to which it has brought an immense accession of business. The Act is the 20 and 21 Vict., c. 43, entitled "An Act to improve the administration of the law so far as respects summary proceedings before Justices of the Peace." The following sketch of a Bill for providing an appeal from the decisions of the Sheriffs in cases in which their judgment is now declared final, has been framed on this model. Obviously it is a matter of indifference whether the appeal is taken to either Division of the Inner House, to the Lord Ordinary, or the Judges on Circuit:—

Whereas it is expedient that provision should be made for obtaining the opinion of the Judges of the Supreme Courts on ques-

tions of law arising in cases in the Sheriff Courts, whereof the value does not exceed L.25 : Be it enacted, etc.,—

1. In every action raised in the Sheriff Court, of which the value does not exceed L.25, it shall be competent to a party who is dissatisfied with the decision of the Sheriff by whom the case was heard and determined, on the points of law involved or upon the admission or rejection of evidence, to make application to the Sheriff, within

days after the hearing and determination of the said action, to state and sign a case, setting forth the facts and grounds of his judgment; and the party so applying, hereinafter called the appellant, may thereafter bring the same under review of the Judges of either Division of the Court of Session [or of any of the Lord Ordinaries thereof; or of the Judge or Judges of the next Circuit Court to be held for the district within which is situated the County in the Sheriff Court of which the said action was brought, as the case may be]. And the said appellant shall, within days after receiving the said case so stated and signed by the Sheriff, transmit a copy thereof to the opposite party, with notice in writing of the Court or Judge to which he has appealed.

2. If the Sheriff be of opinion that the application is frivolous, but not otherwise, he may refuse to sign a case; at the same time granting a certificate of his refusal.

3. The Court to which the case is transmitted under this Act shall hear and determine the questions of law or evidence arising thereon, and shall reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the Sheriff, with the opinion of the Court thereon, or make such other order in relation to the matter, and make such order as to costs, as to the Court shall seem fit; and all such orders shall be final and conclusive. Provided always that the Court shall have power, if they see fit, to cause the case to be sent back for amendment, and thereupon the same shall be amended by the Sheriff, and the judgment of the Court delivered on the case so amended.

4. Where the Sheriff refuses to state a case, it shall be lawful for the appellant to apply by petition to the Lord Ordinary on the Bills, setting forth the facts of the case; and the Lord Ordinary shall *de plano* remit to the Sheriff to state a case or refuse the petition.

5. Sections 16 and 22 of 16 & 17 Vict., c. 80, so far as relates to cases under L.25, to be repealed.

6. Repeals sections 14 and 31 of 1 Vict., c. 41.

7. Interpretation clause—Sheriff to mean Sheriff-Substitute, etc.

8. Court to have power to frame Act of Sederunt.

The above is presented not as a draft but as a sketch of a Bill suitable to the circumstances; and we hope to see some such measure passed into law during the present Session of Parliament.

J. G. S.

#### THE FIRST DIVISION AND THE FREE CHURCH ASSEMBLY.

IN a former impression, we took occasion to direct attention, in a general way, to the rights which form the subject of controversy in this much agitated case; and to indicate the limits and bearing of the argument on either side. Adhering to the time-honoured principle which forbids dogmatism, and shrinks from partisan and *ad captandum* appeals pending the decision of questions before the courts of competent judicature, we have hitherto refrained from indicating any opinion relative to the purely legal questions involved in this case. Nor should we, in the present advanced stage of the litigation, think it incumbent on us, in our profession as public journalists, to enter the field, but that the matter has been forced upon us in consequence of the unusual and highly unconstitutional character of the comments in which a section of the press and the public have thought fit to indulge. It was not, of course, to be expected that so favourable an opportunity for provoking the *odium theologicum* would be missed by those whose vocation it is to minister to the cravings of this amiable propensity. That extreme views should be taken by members of that community so deeply interested in the cause, is natural and excusable; but we are somewhat at a loss to understand why the recent decision should have been converted into an occasion for libelling the administration of justice in our superior courts.

We are especially anxious upon this collateral question, that the views of the profession should neither be misrepresented nor misunderstood. We are not, as Dr Begg puts it in his speech to the Commission, claiming the attribute of infallibility for any four men who may for the time constitute the court of review in the Parliament House; nor do we claim even for the solemn judgments of the

Court any special immunity from that public criticism to which every institution of the country is amenable. If a judge lays down bad law, by all means let us have the ignorance or sophistry, or whatever the cause which has perverted his judgment, thoroughly sifted and exposed. Respect for the high office of the magistrate—loyalty to the institutions of the country, will dictate that in such cases criticism should not exceed the bounds of moderation and courtesy; and, above all, that nothing should be said calculated to weaken the just confidence of the public in the impartiality of these tribunals. Such, at least, was the opinion of a great constitutional authority and fearless critic, Mr Fox, who, in moving for a Parliamentary Committee to inquire into the administration of the law of libel, spoke in the language of respect and admiration of the learning and impartiality of the judges whose conduct he was reviewing; although that respect did not prevent him from exposing, with consummate ability, the errors into which they had fallen, and from calling on Parliament to restore the common law by an act of declaratory legislation. But the agitation to which we think it necessary to advert, is widely different in its tendencies. We have looked through the newspaper articles and reports; and, with the single exception which we shall afterwards notice, we have looked in vain for anything like a rational argument directed to the legality of the judgment which has just been acquiesced in. We are not of those who would discourage the taste for legal controversy outside of the profession. A knowledge of the law is presumed to be attainable by every one of Her Majesty's subjects; and the principles applicable to the decision of the Cardross Case are so simple, as to leave no excuse for affecting ignorance on the subject. Yet the course which has been taken by organs professing to represent the religious sentiment of the community, involves a more arrogant encroachment on the rights of conscience than any court in modern times has witnessed. The Judges of the First Division (none of whom, we believe, are members of the Free Church, and who at any rate, in their public political capacity, can only take cognizance of religious tenets as matter of fact) have been assailed with asperity, because they do not recognise the jurisdiction of the Free Church courts as deriving its authority from the Word of God. Their carefully guarded language as to the non-recognition of a judicial character in these convocations, has been twisted into something like an avowal of practical infidelity; and, finally, an exemption from

civil control has been claimed for the Free Church, such as has never been mooted in this country since the day when a Plantagenet king repelled the haughty pretensions of the papal legate. We wonder if it ever occurred to these intemperate critics to consider what would be the result, were judges to permit their private opinions on matters of religion or policy to influence their judicial determinations. We had imagined that as all sects were equal in the eye of the law, the recognition of any divine authority as regards one body, would imply a disallowance of the like authority in all others. But if it be right for a Presbyterian or Protestant magistrate to consider the *status* of the Free Church Assembly in any other light than that of a secular association, it must be equally proper for a Roman Catholic or Jewish judge to treat that association as a confederation of fraudulent pretenders to the sacred office, whose decisions are inherently null, because wanting the sanction of that spiritual authority which the judge as an individual would recognise. Thus the rights of parties would come to depend on the opinions, the caprice, or the intolerance of the judge.

We have no desire to enter upon the merits of the subject of litigation ; and we should be sorry to become universally responsible for the doctrines that have been broached on either side. We have no sympathy with those precisians who can affect to regard the Free Church, or any other society of Christians, as a body merely "tolerated" by the State. Why, in a free country, should any class of persons pretend to tolerate the existence of another class ? Toleration implies the abstinence, on whatever grounds, from a right to repress. But no such right is at present recognised by the State. The phrase might be appropriate enough while the Test and Corporation Acts were in force, but is a mere impertinence when applied to the present benignant state of the law, under which Dissenters are entitled, in common with all Her Majesty's subjects, to aspire to every office of honour and emolument, and to demand, in the determination of their rights, not merely toleration, but the active protection and assistance of the law. The supporters of Mr McMillan have fallen into another fallacy, in assuming that the authority claimed by the Court of Session as a court of review, in dealing with the judgments of the established Ecclesiastical Courts, necessarily implies a corresponding power of reviewing the proceedings of the Free Church Assembly, who, they say, cannot pretend to a higher or more exclusive jurisdiction than that possessed by the

Church of Scotland under the authority of Parliament. This is perhaps fair enough as an answer *ad hominem* to the plea of exclusive "jurisdiction;" but its force is entirely destroyed when we remember that this jurisdiction, whatever its nature, is derived from the voluntary act of the parties. The Court of Session, in common with the superior courts of every civilized country, must have the power of keeping all other tribunals and public functionaries within the line of their duty; but it is otherwise with private parties, who may unquestionably contract to settle their disputes amongst themselves, and thus for ever exclude the jurisdiction of the Courts of law, in regard to any matter so undertaken to be settled.

This brings us at once to the only question at issue between the Free Church and the public,—we say advisedly, the public, because every citizen is interested in maintaining the common law in its native purity and vigour against the encroachments of ecclesiastical intolerance. While the point of competency was still *sub judice*, the organs of the more democratic portion of the Church made it their interest to keep up a continuous wail of discontented clamour, as to the violence that was to be done to their consciences by compelling them to "satisfy the production." Martyrdom, prison diet, and confiscation of moveables were imprecated upon their party with a fervour which seemed designed either to awaken the sympathies of the public or to coerce the opinions of the judges. Both these objects having signally failed, the pretensions to independence of the civil power are at length finally abandoned; and now that production of the sentence has been formally made, we are glad to see, from the judicious and moderate speeches of Mr Murray Dunlop, M.P., and other members of the Commission, that the case of the Free Church is to be put upon principles which are generally recognised. Two points indeed are raised: (1.) Whether Mr M'Millan can obtain relief by damages; (2.) Whether he can obtain relief by way of reduction. The former is the only point in which the public have any interest; because, practically, the power of recovering damages will always be an effectual check upon those arbitrary tendencies which have ever been the opprobrium of corporate bodies; and because this form of redress necessarily brings the matter before a jury—the best possible tribunal for the determination of a question of ordinary justice between man and man. This question, indeed, is not purely raised in the Cardross Cases; because the conclusions for damages in these actions are directed not against the General As-

sembly, but against the Moderator and the mover and seconder of the resolution of deposition as individuals, who are charged, moreover, with having acted maliciously and without probable cause. Mr Dunlop pointed out very clearly how it was impossible to resist conclusions based on such grounds of action as these, except by meeting the pursuer on the facts of the case. On the general question, whether an action of damages against the members of Assembly conjunctly and severally, would be relevant, we confess we entertain not the slightest doubt, assuming (what is of course denied in this case) that the Acts of the Assembly were "lawless," or in violation of the rules and constitution of that body. But as this point will doubtless be regarded by our legal readers as settled by the cases of *Dunbar v. Skinner* (3 Mar. 1849, 10 D. 945) and *Edwards v. Begbie* (28 June 1850, 12 D. 1134), we do not consider it necessary to argue the matter, or to insist that the same measure of justice which has already been dealt to that comparatively uninfluential body, the Episcopal Church in Scotland, must be meted out with an even hand to all other religious denominations. We had rather conclude by offering some suggestions relative to the other branch of the case, in which, we confess, our sympathies are entirely with the Assembly.

The power exercised by the Court of Session, of reducing informal deeds or acts of parties, is one peculiar to the jurisprudence of Scotland. A Reduction has been defined as a negative Declarator; and if not confined within the limits and rules applicable to proper declaratory actions, this form of action might be attended with unforeseen and absurd consequences. In England there are no such forms as reductive and declaratory actions; but certain fictions are resorted to which subserve an equivalent purpose. Questions of right to land, which are truly declaratory in their nature, are tried under the fictitious action of "ejectment;" and the validity of wills is contested under the issue "*devisavit vel non*,"—the question of validity of the particular deed being thus resolved into the more general issue, whether the testator made a will at all. Now, it is worthy of notice, that, although the declaratory form of action gives ostensibly a wider scope to the decisions of our courts; yet the inconvenience of calling on the Court to find in terms of abstract conclusions which would lead to no practical result, has long since led to the recognition of the rule by which the pursuer must show a substantial pecuniary interest in the matters which he asks the Court

to affirm. The principles which guided the Judges in establishing this rule will be found fully explained in *Gifford v. Traill* (7 S. 854), where the Court refused to affirm certain abstract conclusions relative to the divisions of the counties of Orkney and Zetland, the mode of valuing the lands therein situated, and the privileges of the freeholders. The argument, put in the light of a *reductio ad absurdum*, was very neatly stated by one of the Judges, when he exclaimed that the Court might as well be asked to find and declare, "that Queen Elizabeth died in the year 1601,"—true enough as matter of history, but of no consequence to the patrimonial interests of any one now living. It is clear that this principle of law, if good for anything, has an obvious application to actions of reduction, which are only a particular, namely, a negative, form of the declaratory process. It seems to be admitted on all hands that the notion of reponing Mr M'Millan to his seat in the ministry of the Free Church is out of the question. The Court cannot, even if it were willing, compel the Church to recognise him; and Courts do not generally decree *specific performance*, when from the nature of the case their decree may be disregarded with impunity. *Locum factum imprestabile subit damnum ac interesse*, is the maxim which determines the character of the redress which a Court of law will give in any particular case. If Mr M'Millan is entitled to obtain pecuniary reparation for the injury supposed to be done to his *status* and character, there can be no injustice in refusing the conclusions for reduction; while the fact that the conclusions, if sustained, would remain inoperative, and would merely amount to an abstract assertion of the informal nature of the Assembly's proceedings, rather seems to bring the cause into the category of those ineffectual declaratory actions which the Court have hitherto refused to countenance. We may here anticipate an answer that will probably be made to the view just submitted. The reductive conclusions, we hesitate not to say, cannot be regarded as *ancillary* to any petitory demand for damages that may be competent. They are not so put in the summons; and the cases of Skinner and Begbie prove that no reduction is necessary to clear the way for a verdict of damages.

Believing, as all history teaches, that law and religion move in separate orbits, and cannot come together without danger of disastrous collision, we should regret if a judgment were pronounced that had even the appearance of restricting the perfect liberty of action now enjoyed by religious bodies. Reduction of



ecclesiastical decrees is a proceeding which bears a suspicious family resemblance to the censorship of the press. The true remedy for the abuse of liberty in both cases is by damages. We trust that the right of the individual sufferer to obtain pecuniary redress will never be called in question. To gain exemption from civil responsibility would indeed be a loss to the churches; as it would then become the duty of all who value the dignity of manhood more highly than the external decencies of religion, to abstain from entering into relations which might subject them to a form of tyranny peculiarly obnoxious, injurious, and insupportable.

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NOTES IN THE INNER HOUSE.

*M'Intosh v. Fraser and Others.*

THE pursuer in this case raised an action of damages against certain persons for having, as he alleged, illegally procured his confinement and detention in a lunatic asylum. The jury, however, returned a verdict in favour of the defenders. The pursuer then moved for a new trial, (1) on the ground that the verdict was contrary to evidence, and (2) on the ground of the conduct of the Solicitor-General, who was his leading counsel at the trial. It would appear from the affidavit put in by the pursuer that "he specially instructed the Solicitor-General to examine him, and that he insisted upon this as absolutely essential in support of his case. . . . That when his case was about to be closed, he was engaged in looking over certain memoranda which he had, for the purpose of assisting his memory in giving evidence, and came into Court in order to be examined; but when he arrived he found, to his astonishment, that the Solicitor-General had declared the pursuer's case closed, and the said Solicitor-General informed the deponent that he had resolved not to examine him: That this was contrary to the foresaid special instructions given to the Solicitor-General, and contrary to the understanding upon which he was authorized to act as counsel for the deponent; and had the deponent been in Court at the time when his case was so closed without examining him, he would have protested against the closing of the case, and would have withdrawn the authority which he had given to the Solicitor-General to act as his counsel in the cause." The affidavit further narrates an attempt made by the pursuer to have himself examined as a witness for the defenders, which came to nothing, and then proceeds: "That the defenders, having closed their evidence without examining the deponent, he determined to make another attempt to put before the jury his evidence; and accordingly, at the close of the judge's charge, the

deponent rose to state to the judge the manner in which he had been treated by the exclusion of his evidence, as above set forth, and to request the judge then to have him examined as a witness : That before the deponent made his said statement, he was interrupted by the presiding judge, and he was not allowed to make the statement and request which he intended to do." Upon these statements it was contended for the pursuer that the case came within the authority of the celebrated case of *Swinfen v. Swinfen* (1 Con. B. Rep. N. S. 364, and 24 Beavan 549), and that, following the course therein adopted, the verdict must be set aside and a new trial granted. The First Division unanimously refused to set aside the verdict on either of the grounds above stated. In regard to the first of these it is unnecessary to make any observation, but the second raised a question of very considerable interest in regard to the relations between counsel and client. The case of *Swinfen*, which was relied on by the pursuer, was of this nature:—The Master of the Rolls directed the trial of an issue as to the validity of the will of one Samuel Swinfen, deceased. The issue came on for trial at the Spring Assizes at Stafford in 1856. At the close of the first day, negotiations for an arrangement took place between Sir F. Thesiger, the leading counsel for the plaintiff, Mrs Swinfen, and Sir A. Cockburn, the leading counsel for the defendant, Captain Swinfen. The nature of the proposed arrangement having been communicated to Mrs Swinfen, she expressed her determination not "to listen to the proposal," and to this she throughout adhered. Notwithstanding of this, Sir F. Thesiger, acting on what he believed to be the best thing he could do for his client, agreed to a compromise, under which Mrs Swinfen was to give up the estate on condition of receiving an annuity of L.1000 a-year. The memorandum embodying this arrangement was made a rule of Court, and the question came before the Common Pleas on the defendant's motion to have the rule enforced by attachment. Mr Justice Crowder was of opinion that there was no sufficient proof of a valid agreement between the plaintiff and defendant to entitle the latter to have the rule founded on it so enforced. His lordship thus states the ground of his opinion:—"When a litigant party in a cause entrusts his brief to a counsel, his object is to have the benefit of his advocacy, and not to employ an agent to negotiate terms of compromise. Taking the general rule laid down in *Smith's Mercantile Law*, 5th ed., p. 134, to be correct—viz., that 'the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment'—can it be said that it is part of counsel's usual employment, not only to plead the cause of his client in Court, but to negotiate for the division of the property in dispute between the litigant parties? A client might think a particular barrister an excellent advocate, and therefore employ him, but might have no confidence in his power as a negotiator of

terms of compromise. . . . He professes, in conducting a cause, to act entirely upon his own judgment and discretion, uncontrolled by his client; and the client leaves the whole management of the cause to his counsel. But where a compromise is contemplated, and litigation is to cease upon terms to be arranged, counsel then can only act, as I believe, under special instructions." In consequence of this opinion, Justices Cresswell and Williams, though differing from it, declined to enforce the rule by attachment. The case then came before the Master of the Rolls on a supplemental bill filed by Captain Swinfen. His honour was of the same opinion with Justice Crowder, and dismissed the bill. In his judgment the following passages occur:—"An agent has full authority to do everything that is within the scope of his authority, expressed or implied. What is the authority which is vested in an attorney in these cases? He is employed to conduct a suit for a client, but I apprehend it to be perfectly clear, that a compromise does not come within the term 'conduct of a suit,' and that a compromise is not within the meaning of the words 'management of a cause.' . . . I should no more consider the attorney I employ to conduct a suit authorized to dispose of the property sought to be recovered or defended (his honour held the compromise in question to be nothing less than a sale between the parties, upon certain terms), than I should expect that a person employed to take horses to a particular place to feed or to break them in, would have an authority to sell or exchange them; or that a coachman, employed to drive a carriage, would have authority to exchange it." Throughout these opinions (and they were the opinions of those Judges who were against the verdict), it will be observed that the distinction is clearly drawn between the counsel's discretionary powers in the "conduct" of a cause and his power of ending it by a compromise, and whilst the latter is denied the former is fully recognised. Such a distinction is perfectly essential to the continuance of the system of professional advocacy. Counsel are employed as persons of skill and discretion in the conduct of suits, and unless they are allowed to take their own course in the management of the case, in justice to their own reputation, they will refuse to undertake it. The footing on which the relation of client and counsel rests is, that the former has not the skill necessary for the management of his own case. It would be absurd, therefore, to hold that counsel, selected on account of their possessing that very skill, should be obliged to take their client's directions as to every witness who is or is not to be examined, and as to the particular questions which are to be put to each. No doubt a counsel might expressly undertake to examine a certain witness or pursue a certain line of examination, and if he failed to do so and lose the verdict, possibly the client might have an action of damages against him. But it is unnecessary to consider that question now, for it did not arise in the case of M'Intosh, there being really nothing in the affidavit to show that the Solicitor-General under-

took to examine the pursuer, which the Lord President said he would have been very much surprised to have found that he had done.

The case of Swinfen, thus explained, clearly afforded no sanction to the pursuer's demand for a new trial. On the contrary, it is an authority the other way, for it is very obvious that neither the Master of the Rolls nor Justice Crowder would have interfered with the exercise of Sir F. Thesiger's discretion in the *conduct* of the case, though they denied him the right of *compromising* and so *ending* it.

From the terms of the affidavit, which we quoted, it will be observed that the pursuer complained of the conduct of the Lord President in refusing to hear his explanation, or to examine him at the close of the trial. When, however, it is borne in mind that he did not address the Court till after the speeches of counsel and the charge of the Judge, it is perfectly manifest that whatever other remedy was or is open to him, he was not entitled to expect to have himself examined at that stage, or to demand that the verdict should be set aside because he was not then examined.

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#### THE LAW MAGAZINES.

In an article on the annual Parliamentary paper on Judicial Statistics, the *Law Magazine and Review* calls attention to the disproportionate number of cases actually litigated in the English courts, in comparison with the number compromised or abandoned. The unequal distribution of business among the courts of co-ordinate jurisdiction, such as the Common Pleas and Exchequer, is also noticed. The following remarks on judicial arbitrations will be read with interest:—

That 419 causes should have been referred to the masters is also a notable fact, but one not to be contemplated with unmixed approbation. For, in the first place, we have heard complaints of the too great zeal exhibited, both on the bench and ready acquiescence on the part of the bar, to send down causes for the masters to try, which might more legitimately have been disposed of in open court; and, next, it is notorious that the masters have been overburdened with these references, which are superadded to their proper official duties. The consequence is, that there are perpetual postponements and prolonged intervals between the meetings; great expenses are incurred, considerable inconveniences endured, and the result frequently not accepted with satisfaction. We do not speak on behalf of the junior bar, who no doubt regard these arbitrations as an unnecessary withdrawal from themselves of a remunerative occupation; for, in our judgment, they have themselves to thank for any preference shown herein for the master's office. In the latter, the fees are reasonable, whereas the customary scale of counsel's fees on arbitrations are excessive and unjustifiable. The heavy additional fees demanded by counsel for each sitting, frequently of short duration, and the frightful amount of costs which the losing side has often to pay, has rendered the practice of referring cases to gentlemen of the bar very unpopular. The plea which is set up by counsel, that in undertaking an arbitration, or in appearing before an arbitrator, they are leaving their ordinary duties, and should therefore receive special remuneration, is as rotten as any ancient

vacation plea; for they have been retained to conduct the cause, and if their time is not occupied in Court, their client has a claim to it out of Court; and, moreover, the references are in practice held at times most convenient to counsel. The arbitrator, of course, must be adequately remunerated, and any additional labour or expense of time imposed upon counsel, arising from the peculiar nature of the suit or course of proceeding, should be provided for; but the practice of making a "good thing" out of arbitrations cannot be too loudly condemned.

No one can read the very interesting paper from which we have quoted, without being impressed with the great value and importance of a comprehensive, accurately digested return of Judicial Statistics. We trust that another year will not be allowed to pass over without obtaining an extension of these tables to the courts in Scotland. A comparison of the amount of business transacted in the Superior and Sheriff Courts respectively, and of both with the corresponding judicatories in England, could not fail to throw light on the true causes of that delay which has fallen like a blight upon the business of the Court of Session.

The *Law Times* of 14th January, in an article which we subjoin, complains that the judges and counsel in the Courts of Chancery have combined to render the statutory provisions for importing Jury Trial into the practice of that Court inoperative. If the framers of the statute had studied the history of the introduction of Jury Trial into Scotland, this blunder would not have occurred. The remedy is still within their power. It is, as our Scotch readers will anticipate, to "appropriate" certain classes of cases to Jury Trial—in other words, to make Jury Trial imperative in the specified cases. Thus, and thus only, will the Chancery bar be educated to overcome its repugnance to Jury Trial:—

The present week has witnessed the empanelling of the first jury in the Court of Equity. For this great improvement the profession is indebted to Sir Hugh Cairns. But his measure, although it became law, was for a long time nullified by the reluctance of the courts to adopt it in practice. The Equity judges did not like it, and the Equity Bar were averse to it. The former looked upon it as an invasion of time-honoured principles—a sort of trespass of the common law upon their proper province. The latter were conscious that their training had not qualified them for dealing with witnesses and a jury. So both assisted in quietly burying the new law. Lord Lyndhurst last year called the attention of Parliament to the manner in which its decrees had been nullified, and a commission was appointed to make further inquiry into a subject which was really settled long before. That commission is still continuing its labours, and we are glad to see that Lord Lyndhurst is giving to its investigations the benefit of his presence. We cannot doubt that the result will be to lead to the general enforcement of that rational procedure by *viva voce* examination and a jury, of which the first specimen has been given this week. We congratulate the profession and the public on Sir Hugh Cairns' Act being put in motion at last; and we hope that, even without awaiting the report of the commission, the solicitors will insist upon the adoption of trial by jury in Chancery wherever facts are in dispute, whatever aversion may be shown to it by their advisers. It is the only procedure adapted to the discovery of truth, as reason asserts and experience proves; and this first successful instance of it should induce others to follow the example.

The same paper comments upon the miscarriage of justice in the

case of the Rev. Mr Hatch ; and insists on the necessity of extending the remedy of new trial to the criminal if we would save the Jury system from merited opprobrium. We heartily concur in the recommendation. The *Law Times* thus exposes the injustice sustained by prisoners in England, in consequence of the inducement held out to counsel to suppress evidence in exculpation, with the view of securing the last word with the jury, and adverts to the superiority of the Scotch system :—

The notoriety of this case has given to the particular defect in the law a prominence which ought to be turned to account by improvers of the law. But the incident is by no means uncommon: It occurs every day in the criminal courts. There is not an assize or a quarter session at which counsel and attorneys acting for prisoners are not compelled to choose between the suppression of a defence and the danger of a reply ; and, as a general rule, they seldom resolve in favour of entering upon a defence without having cause to rue the resolution.

The Scotch law is more just to prisoners. Not only does it not give the last word to the prosecution, but in all cases the prisoner has the last word. Without adopting the Scotch system in its entirety, it would be a very great improvement in our own procedure in criminal cases if the last word were to be given to the prisoner, so that his safety may not be jeopardized, as now it is, by the practical exclusion of his witnesses through the prudent dread of the consequences of a reply. Some fears have been expressed that the privilege might be abused by the opportunity it would give for two speeches instead of one. But this might be prevented, as it now is at Nisi Prius, by making it a rule that, at the close of the case for the prosecution, the prisoner's counsel should state whether he intends to call witnesses, and if so, that his speech should be in the nature of an opening, strictly limited to a statement of the facts he proposes to prove ; at the close of his case the prosecution should reply, and then the prisoner's counsel should make his general defence on the whole case.

Or, we see no substantial objection to the witnesses for the defence being called at the close of the case for the prosecution without an opening speech, giving to the prosecution a reply upon it, and to the prisoner the general defence.

But, however it be accomplished, we hope to see the defect removed, and the last word permitted to the prisoner.

The following article conveys a hint which we hope will not be thrown away on the Scotch profession ; though we are bound to say, the reasons for complaint do not exist to the same extent in this country as they appear to do in England :—

An incident in the Divorce Court deserves to be noted, because it gives the authority of a distinguished judge to a complaint not unfrequent in all our courts—the nondelivery of briefs to counsel in sufficient time to enable them properly to master their contents. The reasons for this delay in briefing counsel are various ; but the rarest is, that the brief is not ready for delivery. More frequently it is the result of a very proper desire on the part of the attorney to save to his client the counsel's fees, should there be an amicable settlement at the latest moment ; and it is at the latest moment that compromises are most frequent, for clients are most placable when the possibility of defeat as well as the hope of victory stares them in the face. But this caution, creditable in its motive, is often carried too far, to the injury of the client whom it is designed to benefit, and upon counsel operating as a positive injustice. The aptitude of an experienced advocate in seizing the points of a case almost at a glance is truly marvellous, and seems more like an instinct than an effort of the intellect, and his power of concealing his ignorance of a case he has only partially studied is scarcely less astonishing ; but the attorney is not, therefore, justified in rely-

ing upon the exercise of either faculty in his own behalf. Nor must he forget that his case is not the only one for which the attention of counsel is demanded. Other attorneys having briefs which they at least look upon as equally important, and who have also deferred the delivery of them to the latest moment for the same reasons, will have piled them upon his table, and there must be consultations and conferences, and perhaps only a night for the doing of it all. In such circumstances it is physically impossible that justice can be rendered to a brief so delivered. The utmost that the leader can attempt is to peruse the statement of the case; he cannot look at the evidence, and he must rely upon his junior for prompting in the details. At the assizes there is some excuse for this late delivery of a brief. Counsel does not arrive at the assize town until the evening before the opening of the court, and that one night is alone allowed to him for reading all his briefs and holding all his consultations. If the number of sheets to be read, and the number of minutes allowed for the reading, were counted, it would be found, in many instances, that, with a counsel in good practice, all the hours of the night would be insufficient for the most rapid reading of the pile of manuscript, and that not a moment remains for reflection or research. In London, however, there is no such excuse. The briefs might always be delivered some days before the sittings; and whenever it is possible, it is the duty of the attorney so to do. Even at the assizes it would be well if the attorney would not wait for the commission day, but forward the brief to counsel some days before. Instances are not rare of briefs of considerable magnitude being thrust into the hands of counsel in court, not long before the cause is to be called on. How can the client's interest be properly advocated by the ablest man in such circumstances?

The *Solicitors' Journal* refers to the strictures formerly made in this Journal regarding the delay and expense of suits in the Court of Session, and adds:—

Judging by what one sees in the House of Lords appeals from the decisions of the Court of Session, its procedure certainly requires simplification and a closer approach to a rational method. We agree with our contemporary, that, until some amendment in this respect takes place, the Advocates and Writers to the Signet of Edinburgh will find it harder every day to compete with the rougher but cheaper justice of the Sheriff's Courts.

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## THE MONTH.

It will be observed from the extract in another column, that the Lord President has lightened the dead weight of the First Division Roll, by transferring forty-five cases to that of the Second Division. This timely measure, to the necessity of which we called attention in our last impression, has, we understand, given very general satisfaction. Where the law is so well administered as it is at present in both Divisions of the Court, it is a matter of indifference, alike to agents and suitors, by whom their cases fall to be determined; and we suspect that habit and old associations have a great deal to do with the practice, now become inveterate, of enrolling the majority of cases before the Division which is entitled by courtesy to precedence.

Notwithstanding the exertions which have been made to keep down the arrears of the Division Rolls, it is quite plain to all who are conversant with the practice of the Court of Session, that an effectual remedy will never be provided until a Third Division is constituted. This proposition, which first assumed a definite and tangible form in our impression of last month, in virtue of the suggestion we then made for abolishing the Outer House Debate Roll, has already been received with favour by persons whose opinions are entitled to the highest consideration from the profession. And, what is perhaps of greater importance than the countenance of distinguished names, the justice of this scheme has commended itself to the good opinion of sensible and moderate men in the various walks of the profession both in Edinburgh and in the country. The Outer House has not, in recent times, been held in very high esteem. It was bad as originally constituted, and has not been much improved by subsequent changes. For all practical purposes, its functions may be regarded as obsolete, since the parties seldom think of acquiescing in its decisions if it is possible to take them to review. When we speak of doing away with the Outer House system, we do not of course imply that the time of the Divisions should be occupied with the hearing of formal motions. One judge from each Division would still sit at Chambers to dispose of formal and incidental motions; and, as their Lordships might be required to undertake this duty in rotation, the additional labour devolved upon each would be comparatively trifling, and would be more than compensated by the new Division relieving them of a large share of their regular business.

Among the causes which contribute their share to the general retardation of business in the Court of Session, there are two which admit of easy remedy. We refer to the plea of "irrelevancy," and the practice of stating preliminary pleas. Under the present system, the Lord Ordinary is required to find the unsuccessful party liable in the expenses of discussing preliminary pleas, but only in the event of his availing himself of the right to reclaim; that is, in the very case where the party has shown his *bona fides* by refusing to rest satisfied with a decision against him. But in the large class of cases, in which such pleas are stated mainly with a view to delay, the parties shrink from taking their frivolous objections into the Inner House; yet the Lord Ordinary has no power to award expenses against such *temere litigantes*, who are thus encouraged to go



on wasting the time of the public, and delaying the settlement of the cause, without perhaps the shadow of a case on their objections.

As to the plea of relevancy, it is much to be desired that the Court in this matter would conform to the provisions of the Judicature Act. The Lord Ordinary, before ordering a revisal of papers, ought to examine the summons and defences, and if he finds that a case has not been "relevantly laid," he should either dismiss the action, or order an amendment. It is quite competent to parties at this stage to raise any question as to relevancy of averment; and if they do not avail themselves of that opportunity, they should be held foreclosed from afterwards insisting in any plea of the kind. In short, once a case has got out of the printed roll, there should be nothing to intercept its passage to a jury except the necessary discussion on the adjustment of issues; and the less that is encouraged the better. There is, however, a difficulty at present in absolutely excluding the consideration of relevancy from the preliminary stages of the cause. It arises from the practice of allowing passages of the original record to be struck out on revisal, the effect of which may be to deprive the pursuer's case of whatever relevancy there was in its original statement. The practice is of no use to the party himself, because his original condescendence or defences may be put in evidence against him. Why then should a party be allowed to retract any statement deliberately made in a judicial proceeding? The present system of making up records is unsatisfactory. A much shorter statement of facts would in most cases be sufficient, and revisal ought only to be allowed in the way of addition. We wish to guard ourselves, however, from the supposition that any blame is meant to be imputed to counsel as regards the system of lengthening out records. So long as the rule is in force, that nothing can be proved at the trial but what is set forth in the record, there is an obvious propriety in setting out everything that can be conceived to have any bearing on the merits.

Among the cases which have been decided this session, the Cardross Case and that of *Joel v. Gill* continue to attract a large share of public attention. The *Law Times* is fierce in its denunciations of the Scottish system, and demands that the Lord Chancellor (whom failing Lord Wensleydale) shall bring in a bill on the very first night of the Parliamentary session, to deprive the Scotch Courts of their assumed jurisdiction. In another place we have referred at length to the Cardross decision, and the unreasoning

clamour to which it has given birth. Another case, familiar in the annals of the Court of Session, has quietly dropped out of view, having been settled by a compromise. We refer to the great mineral case of *Gillespie v. Russell*. The opportunity has, in the meantime, been lost, of determining the effect to be given to the plea of concealment as evidence of "fraud inducing a contract." We understand the pure question is likely to be raised in an action which is about to be brought by another proprietor, from whom Messrs Russell obtained a lease of part of their mineral fields.

In connection with the Burgage Titles Bill, which the Lord Advocate has promised to introduce into Parliament, it seems desirable to call the attention of law reformers to the possibility of still further simplifying the transference of landed property. There are obviously two means of effecting the object in view. We may proceed by abolishing superiorities altogether, thereby enabling the vassal to obtain a confirmation direct from the Crown,—a method which would be distasteful to the great feudal proprietors, and which would give no relief to the actual owner, being in effect only a transference of the servitude to a more powerful, and probably, a more exacting superior. The other method which we have in view is the total abolition of the ceremony of confirmation as regards all proprietors not holding from the Crown, and a compulsory addition of a universal rate of five per cent., or such other rate as may be just, to the amount of the annual feu-duty, in lieu of *each* duplicand exigible in respect of renewals. We content ourselves with merely throwing out this hint to the profession, as the subject demands a more careful discussion than we can give to it in this place.

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## Legal Intelligence.

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INNER HOUSE.—*Transference of Causes*.—The following announcement appeared in the Rolls of the Court of Session, of date the 17 January:—  
 "Under authority of the Act 20 and 21 Vict., cap. 56, the Lord President has transferred from the First Division to the Second Division, the forty-five causes specified in the following list, which stood in the First Division Short Roll, and he directs the list of causes so transferred to be entered in the Books of Sederunt, and to be forthwith printed and published on the walls of the Court, and also to be published in the Minute Book, in terms of the Statute. (Signed) Dun. McNeill, Lord President. [The list of causes so transferred includes all causes remitted to the Short Roll, from and after the first day of

the Summer Session (12 May 1859), and prior to the said 17 of January.—*Ed. J. J.*]

**FACULTY OF ADVOCATES.**—At the Annual General Meeting held on the 20 ult., a plan was submitted to the Faculty, for the endowment of hospital for sick children, from the funds of the Chalmers' Bequest, of which the Faculty are trustees. The proposal was generally approved of, and the matter was remitted to a committee.

**THE COMING REFORM BILL.**—Government have obtained two returns from the registrars of Sheffield, the first showing the number of male persons occupying houses at L.5, L.6, L.7, and L.8 rating and rental; and the latter showing the number of such occupancies at L.8, L.9, and L.10 and upwards. A further return has just been obtained from the town-clerk, showing the acreage of the borough, the relative proportions of town and country, the amount of assessment to the income-tax, the present number of voters, and the proportion who voted in the two last contests, the number of houses rated at L.5, L.6, L.8, L.10, and upwards, the ratio of the rateable value of property to the gross rental, etc. From these returns it appears that there are only at present 7381 voters on the register, though the present rental of L.10 and upwards gives 8615 voting qualifications; that a L.9 rental franchise would give 9780 voting qualifications; an L.8 rental, 10,950; a L.7 rental, 13,066; a L.6 rental, 20,668; and a L.5 rental, 27,058, or more than three times the present number. A L.10 rating franchise would give 6052 qualifications; a L.9 rating, 6890; an L.8 rating, 7748; a L.7 rating, 9110; a L.6 rating, 11,200; and a L.5 rating, 15,200, or nearly double the present constituency. Houses and manufactories are rated at about 75 per cent. on the rental, and land at about 85 per cent. The borough is assessed to the income-tax under Schedules A, B, C, and D, at L.1,220,411.

**THE EDINBURGH REFORMATORY FOR JUVENILE MALE CRIMINALS.**—The *Gazette* of January 13 contains the intimation that "the Wellington Farm School, near Penicuik, in the county of Edinburgh, has been certified by the Secretary of State as fit to be a reformatory school for boys, under the provisions of the Statute 17 and 18 Vict., c. 86." It is expected that the reformatory will be ready for the reception of inmates about the 20 February. It will now, therefore, be in the power of the sitting magistrate to take advantage of the Act, under which delinquents committed to reformatory institutions must undergo a certain period of imprisonment—a qualification which it is well known has been frequently made the subject of much discussion and denunciation.

**CONSULAR JUDGES AND THEIR POWERS.**—Our readers may recollect that some years ago, at the close of the Russian war, Mr Edmund Hornby, formerly a commissioner on the American boundary question, was appointed consular judge in the Levant, to adjudicate upon the various matters which had become too numerous and responsible for the consular authorities to investigate thoroughly. The cases coming under his jurisdiction last year numbered about 1400, thus showing the great necessity for such a tribunal in these regions. Mr Hornby, we understand, is at present in this country, with the view of having his appointment settled upon a more definite basis.—*Law Times*.

**THE TORRANEHILL MINERAL CASE.**—The litigation in this case has at length been closed by a compromise. It is agreed that Mr and Mrs Gillespie of Torbanehill shall give up to Messrs Russell, on certain conditions, including a specified lordship, the whole of the disputed mineral which may be found in the barrier along the north march of Torbanehill lands, between Torbanehill and Torbane; or, in other words, where the lands of Torbanehill and those of Torbane join and meet. Messrs Russell, on the other hand, give up the minerals under the mansion-house, farm-buildings, and offices. The important part of the agreement is, that on all the disputed mineral put out and removed by Messrs Russell prior to Lammass 1859, a lordship of one-tenth of the net prices realised

shall be paid; and after that term a lordship of one-seventh of the net prices realised; or a lordship of one-seventh part of the whole out-put of the mineral itself.

**LEGAL APPOINTMENTS.**—Mr James Lawson Hill, of the firm of Messrs Hill and Robertson, W.S., Frederick Street, has, on the nomination of the Lord Advocate, received the appointment of Commissary Clerk, vacant by the death of the late Mr W. Alexander. Mr R. P. Collier, Q.C., has been appointed Counsel to the Admiralty, and Judge-Advocate of the Fleet, in succession to Mr Atherton, now her Majesty's Solicitor-General. This appointment, not being an office under the Crown, does not vacate Mr Collier's seat in the House of Commons, as member for Plymouth. The Attorney-General has directed the junior briefs in the department of the office of Woods, Forests, and Land Revenues of the Crown to be sent to Mr P. M'Mahon, of the Oxford Circuit, in place of Mr W. N. Willes, who has been appointed a County Court judge.

**LEGAL EDUCATION IN THE COLONIES.**—The *Upper Canada Law Journal* of last month contains some interesting information about the course of education prescribed by the Law Society of that province, for persons desirous of becoming either barristers or attorneys. It is to be noted, in the first place, that in either case it is absolutely necessary, in Upper Canada, to pass a preliminary examination; and that the same body—the "Law Society"—has the power of conferring the degree of barrister-at-law, and of admitting and certifying attorneys and solicitors. The students for the bar appear to be divided into three classes, into any of which it is impossible to gain admission without first passing an examination. According to the regulations of the Society at present in force, the examination for admission into the ranks of bar students is in the following books:—

*For the University Class.*—Homer, first book of Iliad; Lucian, Charon, Life or Dream of Lucian, and Timon; Odes of Horace; Mathematics or Metaphysics, at the option of the candidate, according to the following courses respectively:—Mathematics—Euclid, 1st, 2d, 3d, 4th, and 6th books, or Legendre's Geometry, 1st, 2d, 3d, and 4th books; Hind's Algebra, to the end of Simultaneous Equations; Metaphysics—Walker's and Whately's Logic, and Locke's Essay on the Human Understanding. Herschel's Astronomy, chapters 1, 3, 4, and 5; and such works in Ancient and Modern Geography and History as the candidates may have read.

*For the Senior Class.*—The same subjects and books as for the University Class.

*For the Junior Class.*—The 1st and 3d books of the Odes of Horace; Euclid, 1st, 2d, and 3d books, or Legendre's Geometry by Davies, 1st and 3d books, with the problems; and such works in English History and Modern Geography as the candidates may have read.

The "class or order" of the examination passed by each candidate for admission is stated in the certificate obtained by him if successful; and "honours," similar to those conferred at our Universities, are awarded in cases of distinguished success. At the final examination, students belonging to the University Class are arranged according to their University rank; but in the other classes they are placed in the list according to the relative merit of their answering.

The examination of candidates for admission as students intending to become attorneys or solicitors, is in the following "books and subjects," with which such candidates are expected to be thoroughly familiar:—

Blackstone's Commentaries, 1st vol.; Smith's Mercantile Law; Williams on Real Property; Storey's Equity Jurisprudence; The Statute Law; and the Pleadings and Practice of the Courts.

## New Books.

*A Manual of Conveyancing, in the form of Examinations ; embracing both Personal and Heritable Rights.* By JOHN HENDRY. Edinburgh : Bell and Bradfute.

THIS Manual, as the author informs us, is compiled from the notes and memoranda used in preparing for the examinations in the Conveyancing Class of the University of Edinburgh. The standard of proficiency attained in this class, both under the late Professor Menzies and his successor, stands deservedly high ; the rank of prizeman in the conveyancing class being still the chief object of scholastic ambition amongst our law students. We are not surprised that one who has studied with zeal and success under the tuition of Professor Bell should have produced an able and instructive textbook, which, we venture to hope, will lighten the labours of many who are hereafter to tread the same slippery ascent which Mr Hendry has successfully surmounted. Mr Hendry has adopted the "Socratic method," as the one best adapted for imparting information to beginners ; and, beyond doubt, the form of question and answer gives a certain measure of relief to the otherwise arid and dreary level of a continuous commentary on so abstruse a subject as conveyancing. We will even go so far as to assert, on logical principle, that the form of a catechism is of all others the best suited for the enunciation of abstract doctrine. In reading the *question*, the mind is directed to the nature of the right which the answer is intended to elucidate ; and this sounding of a preparatory note, like the strophe and antistrophe of tragedy, lends material aid to the concentration of thought on the particular topic. By the form of the dialogue, the personality of the author as a real, and, we will add, a sensible and cultivated instructor, is kept before the student ; thus securing something of the advantages of oral instruction. Mr Hendry appears to have taken good care to leave no part of his field unoccupied ; and yet within the compass of an ordinary duodecimo he has presented a complete and accurate epitome of the whole science of conveyancing, under its most recent phases. In these days of "express" legislation, the legal author must not linger over his work, else he may find that the first sheets have become antiquated before the volume has got out of the hands of the printer. In looking over the table of contents in Mr Hendry's volume, we see everywhere evidence of the manifold amendments which have in recent times so completely changed the aspect of the law of property. Since the date of Bell's *Principles* there is scarcely any description of right, the transference of which has not been facilitated by the invention of new forms of conveyance. In all these requisites of modern statutory law Mr Hendry shows himself to be proficient, dexterously intercalating the new terminology of his science into the ancient formulas and

maxims which were wont to be the solace of the feudalist under difficulties. The law of heritable property, as modified by the Titles to Land Act, and the new form for completing titles to moveables by conformation, are treated with especial minuteness and care. The provisions of the various Entail Acts, and the methods of summary procedure therein enjoined, have also been fully mastered and lucidly exhibited. We have marked one or two passages to which some slight exception might be taken, less with the view of criticising, than as showing how difficult it is to criticise. One of these is the answer to question 162, in which there appears to be a slight confusion as to the effect of homologation and *rei interventus*. In speaking of the effect of mutual settlements, the author omits to notice the case of *Brown*, reversed on error in the House of Lords (1 M'Q. 79), in which it was held that such deeds are not properly testamentary, but rather of the nature of contracts *inter vivos*. The author falls into the common error of assuming that the word *dispone* is essential to the validity of a conveyance of land. In point of fact, the decisions have never gone further than to say that words must be used importing *de presenti* conveyance, and that "give," "grant," and the like, are inadequate. The creation of an entail by procuratory is one example of a conveyance without dispositive words; and some of the greatest conveyancers of our time have also been of opinion that the words alienate and transfer are of themselves sufficient to pass heritable property. That such was the view of Lord Jerviswoode when Lord Advocate, we infer from the terms of a clause which he introduced into his abortive Burgage Titles Bill, and which was intended to be declaratory of the law as to *de presenti* conveyances. We heartily wish the law student all the pleasure and advantage which Mr Hendry prognosticates from the perusal of his volume; though we must add, that if accompanied, as he recommends, with a systematic exploration of all the decisions and authorities noted on its pages, it will furnish a more remarkable instance of felicity, attained under "creditable circumstances," than any that has fallen under our observation.

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*The Poor Law Magazine for Scotland.* Glasgow: N. Adshead.

THIS useful periodical continues to be carried on with vigour and success. As a medium of intercommunication amongst that class of officials whose interests it represents, it fills a niche in our current literature which the ordinary law periodicals do not undertake to supply. In diffusing sound information on legal subjects connected with the administration of the poor laws, it may also be of essential service to the public, by preventing that system of litigation, the enormous and unjustifiable extent of which is, we presume, attributable to ignorance on the part of these officials of the rights of the parish. In the later numbers of this periodical we observe marks

of improvement, and a higher tone of legal criticism is discernible. An article on Paternal Dominion and Forisfiliation displays considerable research and taste, along with a power of dealing with general principles not always exhibited by those whose profession should elevate them above the rank of legal mechanics. Some interesting details are brought out relative to the extent of the *patria potestas* in this country and elsewhere, in modern times. The author can, with difficulty, bring himself to believe that so late as the time of Lord Stair it was doubted whether a child, even after majority, could leave the paternal mansion without his father's consent. But this ought not to have excited surprise, if he had been aware that, a century later, namely, prior to the Revolution of 1788, a younger son, in the south of France, could not at any period of his life separate himself from his family without authority; and if he did so, his property was confiscated to the father (see Noguès, *Coutume de Haut-Pyrenees*, p. 318). Another peculiarity of the institutions of the *ancien régime* was the exception of the *peculium castrense* and *quasi-castrense*. The reports in this Magazine are carefully edited. Altogether it is well deserving of the support of all who are interested in the Poor Law system.

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*A Treatise on Judicial Factors, Curators Bonis, and Managers of Burghs; with an Appendix, Relative Acts of Parliament, of Sedes-runt, and Practical Forms.* By GEORGE HUNTER THOMS, Esq., Advocate. Edinburgh: Bell and Bradfute.

THE powers exercised by the Court of Session in the appointment of Judicial Guardians were assumed, we are told, on the abolition of the Privy Council, who were in use to interfere, in a variety of cases, in which "summary proceeding was necessary." Though there are a few earlier cases on record, the first formal recognition of this branch of the Court's jurisdiction is the A. S. 1730, in which the Lords, considering "that they had been often applied to for the appointment of factors on the estates of pupils, etc., to the end, that they might not suffer in the meantime, but be preserved for the general behoof and of all having interest therein,"—laid down certain rules for the guidance of the officers so appointed, and these formed the basis of the important legislation of 1849, when the matter was placed on its present footing by the Pupils Protection Act.

The passing of this statute has entirely superseded the ancient forms of procedure which we borrowed from the Roman law, as to the appointment of tutors, etc., for the protection of the property of persons unable to take charge of their own affairs. The office of tutor is a gratuitous, a thankless, and in the end frequently, a thriftless one. But a paid guardian, acting as the officer of Court, and constantly under the supervision of the Accountant-General, is ob-

vously the safest and most proper party to whom the interests of a minor can be intrusted. Having no right to the succession, he is disinterested; and being remunerated, he has some motive to the due discharge of his duties. Further, the procedure introduced by the Act of 1849, was simple, expeditious, and altogether a vast improvement on these old forms of proceeding, which must still be resorted to in the appointment of tutors at law or dative.

We need not wonder, therefore, at the vast importance which this branch of the jurisdiction of the Supreme Court has of late years assumed. The property administered by judicial factors must amount to several millions sterling. In fact, the summary business of the Inner House latterly encroached so seriously on the ordinary business of the Court, that it was found necessary, in 1856, to transfer it to the junior Lord Ordinary. The effect of this change has been to give to the Court of the junior Lord Ordinary almost the importance of a distinct tribunal, with a jurisdiction of its own—a class of business of its own—a form of process of its own. It was, therefore, in every sense well worthy of a separate treatise; and it is with some satisfaction we find that so industrious a man as Mr Thoms has undertaken to supply the defect, which, in this particular, was generally felt to exist in our legal literature.

The work embraces the examination of over twelve hundred cases. It must, therefore, have involved no inconsiderable labour; and, labour, too, for which the author deserves all the more credit, considering that it ranges over one of the most arid regions of legal inquiry. The jurisdiction exercised by the Court, in virtue of its nobile officium, depends so entirely upon judicial "discretion," that any review of their labours forcibly reminds one of Selden's remark, that a Judge's conscience seems to vary with the size of his foot. Every case in this department of law is so entirely a case of circumstances; and when some semblance of a rule is discovered, it is, in its application in practice, so varying and uncertain, that we may well thank the author, who has made it his business to reduce the confusion more confounded into some kind of consistency. For many years, what was law in one Division was scouted in the other. The one would grant a petition *de plano*; in the other, it was certain either to be cast altogether, or, as an unusual favour, sent back for amendment—a courtesy often spoilt with the ungracious remark, that "it must not be drawn into a precedent." The result was very perplexing. No one could advise whether a petition was in form or not. One good result, however, of sending this branch of business wholly to one Judge, will be to introduce certainty and uniformity in this branch of the law. Lord Jerviswoode must feel deeply indebted to Mr Thoms for having reduced his twelve hundred precedents to the moderate compass of 396 clearly printed pages. Mr Thoms fails frequently (and no wonder) to extract much principle out of them; but his Lordship may be safely trusted with the doing of that; and the author would complete the debt we



already owe him, were he to constitute himself recorder of the process. Lord Jerviswoode is clearly entitled to have a set of reports to himself.

In case a second edition be called for, we beg to offer a few suggestions for the author's consideration. In the first place, it is our humble opinion that the whole structure of the book is capable of amendment. The distribution of a subject is always more or less a matter of taste; but, in a legal treatise, no subject is more important than method, and no one is more frequently overlooked. Mr Thoms divides his work into five chapters,—the Circumstances in which Factors are Appointed—the Parties to Factorial Appointments—the Powers of Factors—Cautioners—and Procedure. We think a clearer view of the subject might perhaps have been possible, and that within narrower limits, if a further and more logical distribution of it had been attempted. He makes no provision for the most important matter of all, the Discharge of Factors. Secondly, he should not be so painfully minute in noting every case that has ever occurred. By doing so his work has assumed too much the form of a digest; but, in next edition, we would advise him to take more independent ground, and reduce to one proposition such passages as this:—

———“but the foundation of that interference is necessity: Hunter, 27th Dec. 1711; M'Lellan, 25th Feb. 1832; a legal necessity: M'Connochie, 3d Feb. 1857; as distinguished from expediency: Tweedie, 2d May 1836.”

This may be very convenient for reference; but, besides increasing the size of the book to an extent that is altogether out of proportion to the ground traversed, it makes any attempt to read it utterly hopeless. Thirdly, we would advise Mr Thoms, in preparing the next issue for the press, to get some literary friend to revise the proof sheets, so as to avoid such funny expressions as “recognition of this jurisdiction *has taken place* in the various Acts of Parliament.” These exceptions, we repeat, however, are all matters of taste, and do not detract from the solid merits of the work, which will be found to present, in an accessible form, the fruits of a laborious and careful examination of the decided cases and various Acts of Parliament bearing on this important branch of the law. There is a good index, which makes what is undoubtedly a very unreadable a very useful book.

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*The Nature, Value, and Disputability of Life Assurance Policies considered, and Indisputable Policies recommended*, in a Letter to Lord Campbell. By ALEXANDER ROBERTSON. Edinburgh: T. and T. Clark. 1860.

In the form of a letter to Lord Campbell, the author of this pamphlet enters a vigorous and ably reasoned protest against the extravagant theories which have been incorporated with the law of representation in contracts of assurance. The result of the de-

cisions has been, as he justly observes, to make an ordinary life policy no longer a security on which a prudent man can rely as a provision for his family. In a recent case, it appears the Lord Chancellor had made some disparaging remarks with reference to "Indisputable" Assurance Companies; and insinuated that no "respectable" office would grant policies on such terms. We were aware that respectability was associated in some minds with the idea of repudiation of lawful obligations; but had supposed that this peculiar estimate of what is necessary to social distinction, was confined to individuals of the Brummel type, or to those whose opinions on the monetary question had ripened in the latitude of Pennsylvania. A moment's reflection must convince any candid person that the law which vitiates a policy on proof of misrepresentation, however innocent, and how immaterial soever, is grossly unjust; because, while the contract is broken on the one side, the consideration, the premiums paid for assurance, are not restored on the part of the other. The principle of the Indisputable Policy, which is already in course of being adopted by the leading Scotch companies, is to throw the onus of making inquiry into health, etc., on the company, and to protect the assured from the consequences of any mistake or concealment that may hereafter be discovered. The only wonder is, that people can be got to insure their lives on any other terms; and it seems very desirable that the protection against fraud thus accorded by indisputable companies should, by an Act of the Legislature, be extended to all others. Mr Robertson is entitled to the gratitude of the public for bringing this subject so prominently before them. The letter will be perused with interest by the profession, as it has the merit of being a readable as well as a learned paper.

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## Correspondence.

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[W. G.—We cannot allow the *Journal* to be converted into a Court of Appeal from the decisions of the Inferior Courts.—Ed. J. J.]

### COURT OF SESSION REFORM.

*To the Editor of the Journal of Jurisprudence.*

I AM glad to see that you have been turning your attention to Law Reforms; and I believe that no change would be more generally acceptable than an alteration in the direction you have indicated, with respect to the constitution of the Court of Session. At a time when a section of the public are clamouring vaguely for innovations, which would result in the abolition of all law, or the erection of as many separate systems of jurisprudence as there are counties in Scotland, it is incumbent on those who are concerned in the administration of justice to give a practical turn to the agitation, and enlist public sympathy in their favour, by supporting any moderate and well-considered plan for that amendment of our existing tribunals.

The recent improvement in appellate procedure, since advocations may be reported directly to the Inner House, is an improvement in the right direction. The advantage which has been taken of this wise provision proves its beneficial tendency. The intervention of a third individual Judge, and the delay and expense of an intermediate state or mid-passage, had not one single argument in its favour. There are cases on record where the Sheriff-Substitute decided in one way, the Sheriff in another, the Lord Ordinary in a third, and the Inner House differed from all three.

The various modes of review are, however, the subjects of just complaint.

First, There is appeal in cases below L.12, and in cases above L.25 in value (and which is not always of easy ascertainment).

Second, Advocation.

Third, Suspension.

Fourth, Reduction.

These modes are all different in form. The example so judiciously set in advocations, and to so great an extent adopted, ought to be extended to all modes of review. A simple *Note of Appeal*, accompanied with caution for costs, should suffice to carry all prior judgments directly from the Sheriff to the Inner House. The effect of such speedy and economical mode of review would speedily be found to have a most salutary effect both on the energies of the Bench and Bar of County Courts.

No doubt the increase of such appeals would greatly add to the Rolls of the Inner House; and here the remedy of a Third Division, so ably argued in the *Journal*, would fall to be adopted. There appears no possible objection to this plan. Even at present, the diminished Rolls of the Outer House Judges point in that direction. In England there are three Supreme Courts of Law. Scotland, until recently, besides her Court of Session, with *fifteen* Judges, had her Supreme Courts of Exchequer, Admiralty, and Commissary. All have been merged into the Court of Session, which, notwithstanding the increased business, has had two of her Judges withdrawn.

All incidental matters could easily be conducted by the Judges in rotation, sitting in the Outer House, as was the practice before the division of the Courts and the appointment of permanent Ordinaries in 1808,—or in chambers, as is done to so great an extent in England.

If the Court was divided into three chambers, the abolition of Outer House practice would enable senior counsel to attend to the cases in full Court. It would be for the further advantage of the profession were the practice of England to be adopted, and certain counsel were to attach themselves to certain divisions. In fact, this is an arrangement which the agency by an understanding could easily introduce. In this way something more than the *name* of a counsel might be obtained in return for his fee.

With one other remark, these observations are concluded. The addition of a third chamber would of course increase the possibility of conflict of decisions (luckily, not now of frequent occurrence, and not more so than between the three Courts of England). But in order to check appeals to the House of Lords, so tedious and expensive, an *intermediate* Court of Appeal might be instituted, after the pattern of the Exchequer Chamber of England. This might be constituted of the three chiefs of the chambers, who could sit for a certain time after each Session. The number would insure a deliberate judgment, and prevent an equal division of opinion. It would impart uniformity to our law, and assuredly diminish appeals to the House of Lords, which might perhaps be altogether abolished in cases of unanimous judgment of this Court of Appeal. Advantage should be taken of the proposed change to revise the nomenclature of judicial titles. There might be then the Lord Justice-General, the Lord President, and the Lord Justice-Clerk, or, as that name is one which sounds strange to English ears, it might be well changed into the Chief-Justice of the Third Division.

A COUNTY COURT JUDGE.

23d January 1860.

## SHOULD THERE BE A THIRD DIVISION?

SIR,—The suggestions which you make for expediting the business of the Court of Session, so as to revive somewhat the confidence of the country in it, are undoubtedly worthy of consideration by the Government. The great evil of the present system of pleading in the Court, is the immense amount of labour and expense involved in preparing a process for discussion, and then the very summary way in which it is disposed of when it is heard. The long records are rendered necessary by the absurd decisions, which will allow nothing to be proved except what is specifically set forth as matter of averment. I met an English solicitor lately, who informed me that even in the worst days of Chancery pleadings in England, nothing like this was ever known; and until the Court depart from these decisions, the records in the Court of Session will be the clumsy, verbose, and inartistic compositions which they now are.

But unquestionably the great evil is the delay in the Inner House. I cannot say that this is the fault of the Judges. They give a fair day's work for a fair day's wages, and the shortness of the Session is not attributable to them. Undoubtedly they have it in their power to lengthen the Sessions somewhat; but I question whether this would be reasonable, except to the extent of taking off two or three weeks from the long vacation. The true remedy is a Third Division, and the abolition of the Outer House, for the purpose at least of pronouncing judgment. The four junior Judges might sit in the Outer House till eleven o'clock, making up records and hearing motions for diligence, and the like; and then at eleven o'clock, four of them might proceed to the Justiciary Court-room and serve out the remaining three hours till two o'clock, hearing and deciding causes as a *Third Division*. No one cares for a judgment of a Lord Ordinary. It is treated with such contempt by the Divisions, that although it were acquiesced in by the best counsel at the Bar, the Court will not allow it to be referred to as of any authority, thereby indicating their opinion of it. In every important case, a Lord Ordinary's judgment is reclaimed; and thus there is the expense of two litigations, when one might serve. Add to all this the delay, and its consequent anxieties and worry, and nothing more need be said for the transformation of four useless functionaries into an admirable Court.

It only requires a little vigour on the part of those interested in this matter, to get this real reform carried; and I merely write this to say, that it is in accordance with the prevailing opinion of that branch of the profession to which I belong.—I am, etc.

A PRACTITIONER.

Edin., 20th January 1860.

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MARRIAGE WITH A DECEASED WIFE'S SISTER.

SIR,—I have often heard it stated, that opinions in favour of the legality of the marriage of a man with his deceased wife's sister were given by President Blair when at the Bar, and also by Lord Moncreiff, and by some of the lawyers at the end of the last century. These opinions may be still in the hands of some professional gentlemen, and if so, I trust they will be made public. The question is a very interesting one, and such opinions as these would tend very much to settle it. I trust some of your readers will in your next number be able to furnish information on the point.—I am, etc.

ONE WHO IS INTERESTED.

22d January 1860.

# Digest of Decisions.

## COURT OF SESSION.

### FIRST DIVISION.

*Susp.*, RANKIN v. MARSHALL.—Jan. 11.

*Lease*—*Clause of Reference*—*Extinction of Subject*.

John Marshall, Esq. of Chapelton, let the ironstone, lime, and coal, except splint coal, to J. T. Rankin, younger of Auchingray, under a lease containing a stipulation that the lessee could abandon on the mineral field becoming unworkable or sterile, which fact, if the parties differed, was to be determined by one of three arbiters named in succession. Rankin, in November 1856, gave notice of his intention to abandon the lease; but though the parties differed as to the nature of the field, no application was made to the arbiters. Marshall has recorded the lease, and given his tenant a charge for rent, which he suspends on the ground that he had abandoned the lease. Lord Kinloch sisted process, to allow the suspender to apply to the arbiters. He reclaimed, contending that the charge should be at once suspended, as being improperly given *before* the condition of the mineral field was ascertained; but to-day the Court adhered (Lord Curriehill dissenting), the pleas of parties being reserved entire till it was seen what was the result of the proposed inquiry.

*Pet.*, A. B.

*Lunatic*—*Curator Bonis*—*Forms of Certificate of Sanity*.

In a petition for the recall of the curatory of a person, formerly insane, now restored to health, the certificate bore that "he had been examined in the Crichton Institution," whither the petitioner had gone to see the doctors for the purpose of saving expense. The Court observed that certificates of sanity ought not to bear on their face that they were granted in a lunatic asylum; and they were ordered to be withdrawn. The patient, it was said, should have been visited in a hotel.

*App.*, EWING IN WATSON'S SEQUESTRATION.

*Bankruptcy*—*Appeal*—*Service*—*Mandatory*.

Appeal at the instance of John Ewing, writer in Alloa, as trustee and as mandatory for the trustees, acting under the trust disposition and settlement of the late Robert Chambers, shoemaker, Alloa, against a deliverance of the Sheriff-substitute of Clackmannanshire, in the sequestration of John Watson, writer in Alloa. Mr Ewing attended the meeting of creditors as mandatory of the trustees; and carried a resolution against which some of the creditors appealed to the Sheriff, who ordered service "on the said John Ewing," and sustained the creditor's appeal. Mr Ewing now brought this judgment under review, and the objection was taken that the appeal was incompetent, in respect that the mandate under which Mr Ewing acted empowered him only "to attend, act, and vote at all meetings under the sequestration," not to bring an appeal in the Court of Session. The Court held that if the objection was to be entertained, as regards these proceedings, it went much deeper than the present appeal. It went back to the original appeal to the

Sheriff, at the instance of the present respondents, notice of which was served upon John Ewing alone, and not upon any other parties, and he alone had been found liable in expenses. It appeared to the Court that as this defect in the instance went back to the beginning of the proceedings, the proper course was to quash them, and remit to the Sheriff to commence anew. Expenses reserved.

BUCHANAN v. HEUGH'S TRUSTEES.—*Jan. 13.*

*Extract—13 & 14 Vict., c. 36.*

In this case the Court held that the section 28 of the Court of Session Act, 13 & 14 Vict., c. 36, applies only to the particular species of interlocutor called an "Act and Warrant of Decree," and not to the decrees of Court generally, which still require, as formerly, an *interim* allowance of extract, where the cause is not exhausted. On this point, the following memorandum was prepared by the Extractor, and addressed to the Lord President:—The clause as it originally stood in the *Bill* (14 Mar. 1850), proposed to enact, "That *every* interlocutor or decree" should be extractable, without special allowance granted by the Court or Lord Ordinary to that effect. This proposed provision was altered on considering a printed Report on the Bill by the Writers to the Signet, p. 18-19;—and after meetings with a committee of that body, together with observations on the clause for Mr Pitt Dundas as Deputy-Clerk Register, and explanations required from the principal Extractor,—and it was ultimately restricted to "every ACT AND WARRANT AND DECREE," the peculiar nature of which will be immediately adverted to. As in the Court of Session, there are certain writs,—*Summonses, Petitions, Notes of Suspension, etc.*,—by which causes may be *originated* (no one of which can be competently substituted for the other), so there are distinct statutory forms of extracts, by which causes may be wholly or partially sent *out of Court*. Reference is respectfully made to the Schedule of Forms in the Act 50 Geo. III., c. 112 (1810). To each and all of these decrees, the Extractor is bound by 1 and 2 Vict., c. 114, to annex a "*Warrant of Charge*" for payment or implement, where personal diligence is competent. There is also a distinct and separate Form of Extract, called an "Act Warrant and Decree," which is obtained, in a large majority of cases, without litigation.<sup>1</sup> To this form there is no warrant in execution attached; and it was to this writ alone, as the statute expressly bears, that the 28th §,—it was thought,—might be made to apply with safety. But the clause does not, with deference, embrace—as the unaltered Bill would have done—*every* description of partial or *interim* decree, deciding only part of a litigated cause, and which may be enforced by personal diligence, while there are other points still in dependence between the parties. The Court has always exercised great caution in allowing such partial judgments to go to execution,—*Sinclair v. Sinclair*, 19 Nov. 1833, *S. and D.*; and there are many other unreported cases. In June last, Lord Mackenzie re-

<sup>1</sup> *E.g.*—Granting authority to a Judicial Factor to make up titles; to the Accountant of Court to deliver up deposit receipts; to Banks to pay consigned funds; to the Keepers of the Public Records to deliver documents,—Record Deeds of Entail, Disentail, Excambrous, etc., etc.

fused to grant warrant to extract a partial decree which did not exhaust the cause, because when the suit came to be finally disposed of, the party who had obtained it might ultimately be found to be the *debtor*, not the creditor of his opponent. For the guidance of the Extractor, therefore, and the preservation of the records, and many other important reasons,—it is essential that he should know *when* he is to issue an *interim* decree, by the Court or the Lord Ordinary, in an interlocutor, granting an allowance to that effect according to immemorial practice. It may only further be observed, that it is, and has always been, the duty of the extractor to transmit the warrants of every extracted decree (unless *interim* extract be allowed), to the general record; and that had the original clause passed into a law, one evil consequence—amongst many others—would (as stated by Mr Pitt Dundas) have been that processes, returned to the clerks on the Extractor's supposition that the interlocutor extracted was *interim*, when perhaps it exhausted the case, "may be borrowed up and lost sight of altogether, while all that appears in the register of the Court is a record copy of the extract, with a marking to show that the process is not there." As the note in to-morrow's Roll is calculated to raise doubts as to the meaning of the Act of Parliament, and to maintain that it applies, in the words of the original Bill, "to *every* interlocutor or decree," it is extremely desirable that the question should be definitely settled; and the Extractor has taken this liberty, most respectfully to lay this memorandum before your Lordship, as the view which the Court may adopt in this case must regulate the practice of his office in future.—Humbly submitted by

JOHN PARKER.

EXTRACTOR'S CHAMBERS,  
12th January 1860.

It may not be improper to add, that the Sheriff Courts Bill (1853) contained a clause exactly the same, *mutatis mutandis*, as that which is now law in the Court of Session. But it was *entirely* struck out in the House of Lords on cause shown.

J. P.

SECRETARY OF WAR v. THE CITY OF EDINBURGH.

*Expenses—Counsel.*

In this case the Crown was found entitled to expenses, and the question was now raised as to whether they were entitled to charge for three counsel, the other side having only had two. The Lord President observed that there was no absolute rule as to the class of cases in which the expenses of three counsel will be allowed. Whether they were to be allowed or not must always depend on the circumstances of the particular case, and to some extent on the pressure brought to bear on it by the losing party. The mere bulk of a case was not the sole consideration to be looked at. If it had been, then the present case would have required more than three counsel on each side. The table was covered with the plans which were produced, and these were only a selection. He didn't know that the Crown was to be dealt with otherwise than a private party would have been dealt with. It was very likely that in every case the Crown had three counsel, and it was quite right to have so many, if it thought them necessary for the protection of its

interests; but that was no reason why more than two should be allowed against the unsuccessful party.

COCHRANE v. EWART.

*Property—Servitude—Part and Pertinent.*

The pursuers are tanners and curriers in Newton-Stewart, and the defender a draper there. The claim sought by the pursuers to be asserted and enforced was of a right to the use of a subterranean drain and cess-pool within the defender's ground, for the purpose of carrying off the surplus water of their tan-yard. The action accordingly concluded for the restoration of the drain, and for the removal of a wall erected by the defender behind the east wall of the tan-yard, and of the clay puddling inserted by the defender between the two walls, in so far as they interfered with the free passage of the water from the tan-yard into the defender's ground. It appeared that, till recently, the whole subjects were held by one proprietor, and since they had come into the hands of the pursuer and defender, the latter refused to receive the foul water from the pursuers' tan-yard. The Lord Ordinary (Neaves) allowed a proof; and on considering it, decided against the pursuers, holding that they had failed to prove facts and circumstances sufficient to support their claim. The pursuers having reclaimed, the case was argued before the First Division. To-day Lord Deas delivered the opinion of the Court, altering the judgment of the Lord Ordinary, holding that the pursuers were entitled to the servitude claimed by them, on the ground of an implied grant thereof established by the actings of the proprietors of the subjects during a period of more than forty years, and that they were entitled to reasonable access for the purpose of cleaning the drain.

CUTHBERTSON v. ELIOTT.

*Expenses—Haver—Cost of Search.*

In this case the pursuer was found entitled to L.950 of expenses. The defender objected *inter alia* to a charge of L.41, being 6s. 8d. an hour for 123 hours engaged in a search for documents which he was called on to produce as a haver. The Court held that in doing so he was not acting professionally, and therefore not entitled to professional profit, inasmuch as he was cited not *because* he was a professional man, but *because* he was custodian of the documents who happened to be a professional man. But he was entitled to some remuneration like any other witness, and the Court allowed him in the circumstances L.16 of the L.41 claimed. Another objection was stated to the professional charges of the pursuer at a meeting in London for the examination of the defender, where the pursuer was further represented by counsel and a London agent. The Court repelled the objection to the pursuer's charges, but ordered those for the London agent to be struck off.

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SECOND DIVISION.

JOEL v. GILL.—Jan. 11.

*Process—Reclaiming Days.*

In this case, Lord Jerviswoode, on the 16th of December, pronounced an interlocutor approving of the auditor's report taxing the amount of the expenses due by the pursuer, against whom the Court had decided,



at L.191, 2s. 3d., besides the dues of extract. A reclaiming note for the pursuer having been lodged on the 4th of January, the box-day in the Christmas recess, it was objected to as incompetent, on the ground that, under the Bankruptcy Act, section 171, the reclaiming note ought to have been presented within fourteen days. The Lord Justice-Clerk—The 171st section of the present Act must be construed with the aid of the 129th section of the Act of 1839. That Act ordained that in such cases an interlocutor might be reclaimed against by “a reclaiming note in common form.” At that time a reclaiming note in common form meant a note which had been presented in twenty-one days during session, or by the box-day if the twenty-one days expired during vacation. The only alteration made by section 171 of the present Act was, that it substituted fourteen for twenty-one days. The note had, therefore, been well presented at the box-day in the recess, as fourteen days, in the sense of the Act, had not elapsed. Lords Cowan and Benholme being of the same opinion, the Court repelled the objections to the reclaiming note.

COOPER'S TRUSTEES *v.* MACKENZIE *et al.*—Jan. 13.

*Trust—Vesting—Legacy.*

The late John Pennycook, merchant in Dundee, by his trust settlement dated 16th November 1838, declared that he considered himself morally bound to make up to his creditors the loss they had sustained through his insolvency, and therefore provided that after his death his trustees should pay to the creditors whatever sums might still remain unpaid; not, however, with the view that these payments should “be made in all cases to the original creditors themselves, or those who by succession, assignation, or legal diligence, have or may come to be in the eye of the law the legal representatives in such debts, but in the case of insolvency or other such change, to their families, or others to be named in the list to be left by me the said James Pennycook, in which list I will specify the amount which I consider to be owing, and the persons to whom I mean the payments to be made.” David Mackenzie and Colonel Rickard were two of Mr Pennycook's creditors. In a list left by Mr Pennycook, but denied to be probative by the pursuers, “D. Mackenzie's family” were mentioned as the parties to whom, in Mackenzie's case, the payment was to be made; but Rickard himself was named in his own case. The pursuers, who are creditors of David Mackenzie and Rickard, brought action against the representatives of Mackenzie and Rickard, maintaining that they are entitled to the sums received by the latter parties under Mr Pennycook's settlement. The Lord Justice-Clerk (with whom the other Judges concurred) held that as what Pennycook had done was clearly gratuitous, his creditors could only take those payments as gifts. This was done by the form of a legacy. Both Mackenzie and Rickard predeceased Pennycook; the legacy therefore lapsed so far as respected them. These sums could not therefore be held to be subject to the debts of Mackenzie and Rickard. The motive assigned for the legacy, no doubt, was unusual, but that had nothing to do with its legacy character.

LAW *et al.* *v.* WILSON *et al.*—Jan. 13.

*Partnership—Clause.*

The late Mr A. Liddell and the late Mr R. M'Laren were in partner-

ship as ironmongers in Glasgow, under a contract containing a provision that "the books of the company shall be balanced by the said Andrew Liddell on the 1st day of January yearly, and the balance-sheet, being signed by the partners within two months after that date, shall be probative." The last balance was struck at the close of 1825, but the balance-sheet was not signed till the 25th April 1826. In a question between the representatives of the partners, it was maintained for the pursuers that these balance-sheets were, under the contract, ineffectual and improbativ. The Court, adhering to the interlocutor of the Lord Ordinary, held that even if any objection could originally have been taken, it had been passed from by the partners in signing the balance-sheet.

JOHNSTONS *v.* THE PROVISIONAL COMMITTEE OF THE DUNDEE AND  
NORTHERN JUNCTION RAILWAY COMPANY.—*Jan 19.*

The pursuers alleged that they were instructed by the Provisional Committee to engrave certain plans, in payment for which they now claim £110, 6s. The Lord Ordinary had decided that, under the prescription of the Act of 1579, the claim of the pursuers must be proved by the writ or oath of the defenders. The pursuers accordingly next founded their case on four minutes of the meetings of the defenders, and on their judicial admission that they had instructed Mr Grainger, the engineer, to proceed with the survey and parliamentary plans. The Court held that the constitution of the debt was not proved. The Lord Justice-Clerk observed:—A provisional committee was not, as had been argued, of the nature of a partnership, in such a manner as to imply that a mandate was given to any one member of it to act on behalf of others. In making such a claim, the pursuers would have to prove it against all the fourteen defenders. Now, it was not averred that more than seven of them had ever been present at the meetings in question; at the meeting which alone was of any importance on this question (that of the 28th November 1848), only four were present; and the minute was only signed by one. By the pursuer's own showing, they had really no case except against these four. This minute, which was merely a minute of private parties, could not even bind the three present who did not sign, in conformity with the opinion of Lord Eldon in the case of Macartney, although it might be used among other adminicles of evidence. The debt was not even proved against the man who signed the minute, for the minute did not contain any admission of the debt at all. Lord Wood, Lord Cowan (on the special ground that the minute of 28th November 1848 really contained no admission of the debt), and Lord Benholme concurred.

SCOTT *v.* HALL AND SONS *et è contra.*—*Jan. 19.*

*Sale—Delivery.*

This was an advocacy from the Sheriff Court at Forfar. The facts are sufficiently detailed in the following opinion of the Court delivered by the Lord Justice-Clerk:—It is not necessary to call for an answer. The contract in this case was reduced to writing, certainly in a very short-hand way, still as distinctly as is usual in such contracts. It is a contract for the sale of a quantity of potatoes for a slump sum. The conditions of the contract are, that the defenders were to put the potatoes in sacks,

and that the pursuer was to drive them to Bridge of Dunn Station, and there tender delivery by the first week in March. This last condition seems to have been departed from by mutual consent. There is no stipulation as to the time for payment of the price. The defenders seem to have felt this deficiency, and have been under the belief that they might supply it by a proof. I do not think it necessary to give an opinion on the competency of the evidence led, as I hold it to be utterly worthless, the one-half of it being neutralized by the other. In a contract like this, where nothing is said about the payment of the price, the law reads it as a ready-money bargain. A ready-money bargain means one in which the obligations of payment and of delivery are reciprocal. But what did the parties do here? So far from the defenders standing upon their strict legal rights, they made a payment of L.300 to account, and we have it clearly and distinctly proved that when Scott wrote demanding a payment of the price, he had not delivered anything like the quantity corresponding to the sum which he had received. In short, he had got payment of the price of a quantity far exceeding what he had delivered. In stopping delivery, I am of opinion that he committed a breach of contract. He was bound to go on delivering, at least up to L.300 worth, before demanding any further payment. I adopt entirely the interlocutor of the interim Sheriff-substitute (Mr Guthrie Smith), which thoroughly exhausts the case, and puts both facts and law in the clearest light.

M. BRADIE *v.* MACBROOM *et al.*—Jan. 19.

*Nuisances Removal Act—Bye-Law.*

This was a reduction of a decrees and warrant of the Justices of Ayrshire, finding the defender guilty of a contravention of a bye-law passed in execution of the powers conferred by the Act 19 & 20 Vict., c. 103. The bye-law in question was to the effect "that no pig-stye shall be kept within ten yards of any dwelling-house, workshop, or place of business within the burgh of Girvan or suburbs thereof, under the penalty of being removed at the cost of the party to whom it belongs, after intimation of two days' notice from the Inspector of Nuisances to remove the same." The Lord Justice-Clerk, after adverting to the importance of the jurisdiction which the Court was bound to exercise for preventing the local authorities from overstepping their powers, went on to show that in this case there had been a deviation not only in form but in substance from the requirements of the Act. The effect of the bye-law was to make it the law of Girvan, in the matter of nuisance, that a pig-stye within ten yards of any dwelling-house, etc., is a nuisance in terms of the 8th section of the Act. The Act itself describes what is to be held as a nuisance,—“Any animal so kept as to be injurious to health.” But the bye-law proscribes as a nuisance a pig within ten yards of a dwelling-house, without any inquiry as to whether it is kept in such a manner as to be injurious to health or not. Now, that may be the opinion of the Girvan authorities, and it may be well founded, but it is not what the Act says. They might as well say that all pigs were nuisances; and, if they have power to act as they have done, they might put down all pigs. It was argued that this was only a direction to the inspector, that he is to hold it as a *prima facie* case of nuisance where there was a pig-stye in

such proximity to a dwelling-house, and that it still remained for the parochial authorities to consider whether the possessor of a pig-stye in such a position should be compelled to remove it as a nuisance. That is to mistake entirely the position of matters, because it is the parochial authorities who are complainers, and it is the proceedings of the Justices that we are considering. Instead of inquiring whether the nuisance complained of was injurious to health, the parochial authorities presented the petition on the allegation that the nuisance was a contravention of their own bye-laws, and the judgment was in terms of the prayer of the petition. The attempt to give the bye-law the construction of being a mere direction to the inspector cannot be listened to, because it is a prohibition under the sanction of a penalty, and to have a statutory effect. I hold that this is not a proceeding sanctioned by the Act, and I have therefore no difficulty as to the provisions of the finality (sec. 49), because in making and in giving effect to the bye-law the Parochial Board clearly exceeded the powers conferred by the statute. The other judges concurred.

INGLIS v. DIRECTORS OF WESTERN BANK.—Jan. 21.

*Contingency—Remit.*

In this action, at the instance of the liquidators of the Western Bank, a motion was made by the defenders to have the case remitted to the First Division, *ob contingentiam* of the actions by individual shareholders now in dependence in that Division. At advising, the Lord Justice-Clerk said:—The Court have now had an opportunity of fully examining the pleadings in this case, and comparing them with the records in the seven different actions at the instance of Inglis and others, the shareholders of the Bank. We have also conferred with the Judges of the First Division, and we are all of opinion that there is no sufficient reason for remitting this case to the cases depending in that Division. When an action has been brought before one Division of the Court or Lord Ordinary, the statute requires the other Division or Lord Ordinary to remit to that first action any others that may thereafter come before them relating to the same subject, matter, or thing, or having a connection or contingency therewith. It was not contended that the case now before us relates to the same subject, matter, or thing with the actions depending before the First Division. But it was very earnestly contended that there was a necessary contingency between the cases, which rendered their trial in one Court expedient and proper, and thus brought them within the meaning of the clause of the statute. It may not be very easy to define the legal term contingency, but it is at least clear that the defenders attach to it far too loose a meaning when they say that any two cases have contingency which may throw light on one another, or which may incidentally involve an inquiry into some of the substantial matters of fact. The grounds on which the Court held that there was no contingency as regards the cases under consideration are chiefly these:—1st, The parties are not the same. The liquidators, in pursuing this action, do not in any way represent the interests, rights, or claims sought to be enforced in any of these other cases. Neither are the defenders the same. 2d, The objects of the action are essentially different. In this case the object is to make the defenders responsible to the company, and all its partners,

for all the losses sustained by the Bank from certain causes during the period libelled. The object of the pursuer in each of these other cases is to make certain individual directors relieve him of his whole obligations and liabilities as a partner of the Bank, and so to escape entirely from the consequences of having purchased shares, and become in law, and in a question with the public and the other partners, a partner of the company. 3d, The results of the action will, if they are successful, be entirely different. Nothing that is recovered in this action can be available to satisfy the demands maintained in any of the others. Nothing that is recovered by any individual pursuer in any of the other actions can be converted or used to satisfy to any extent the interests or rights represented by the pursuer of this. 4th, The grounds of action are substantially different. In this, the ground of action is the malversation of the defenders in their offices of directors and managers respectively; in those, it is fraudulent misrepresentation and concealment by certain individuals of the state of the Bank's affairs, whereby each of the pursuers was misled and induced to purchase shares, but which fraudulent misrepresentation and concealment would be an equally good ground of action whether the ruinous condition of the Bank was brought about by malversation of the directors and managers or by innocent misfortune.

### OUTER HOUSE.

January 10.—LORD KINLOCH.

INGLIS v. DOUGLAS.

PEARSON v. DOUGLAS, etc.

In the first of these actions, Lord Kinloch has issued the following interlocutor:—

*Edinburgh, 10th January 1860.*—The Lord Ordinary having heard parties' procurators, and considered the process, Repels the pleas founded on the institution of the action at the instance of the Western Bank and its liquidators against the defender, Mr Douglas, and others: And finds that the present process ought neither to be dismissed nor sisted in respect of the dependence of that other action: Repels also the objections to the form and structure of the summons and record, and to the title to sue; reserving all pleas on the merits of the case: *Quoad ultra*, Finds that, in the present case, it is not expedient or proper to determine any question of law and relevancy anterior to trial; and appoints the pursuer, within eight days, to lodge the draft issue, or issues, which he proposes for the trial of the cause.

W. PENNEY.

A similar interlocutor was pronounced in the cases of *Pearson v. Douglas*, *Wilson v. Douglas*, etc. As these decisions are no longer recent, we do not feel justified in transferring to our pages the learned and elaborate notes which accompanied these interlocutors. In the cases of *Graham v. Douglas*, and *Landale v. Douglas*, interlocutors were pronounced in the following terms:—

*Edinburgh, 10th January 1860.*—The Lord Ordinary having heard parties' procurators, and considered the process, Repels the plea that all parties interested have not been called: Repels also the pleas founded on the institution of the action at the instance of the Western Bank and its liquidators against the defender, Mr Douglas, and others: And finds that the present process ought neither to be dismissed nor sisted in re-

spect of the dependence of that other action : Repels also the objections to the form and structure of the summons and record, and to the title to sue ; reserving all pleas on the merits of the case : *Quoad ultra*, Finds that, in the present case, it is not expedient or proper to determine any question of law or relevancy anterior to trial ; and appoints the pursuer, within eight days, to lodge the draft issue, or issues, which he proposes for the trial of the cause.

W. PENNEY.

January 13.—LORD KINLOCH.

ADDIE v. WESTERN BANK.

*Reduction*.—Where the pursuers of a reduction were in possession of the documents called for in the summons, and an order for satisfying the production was past due, the Lord Ordinary appointed the pursuer to produce the documents in question, and thereafter held the production as satisfied.

January 13.—LORD KINLOCH.

BINNEY AND CO. v. CLYDESDALE CHEMICAL CO.

*Title of Issues*.—His Lordship said he wished to call the attention of agents to the importance of accurately framing the titles to issues.

The proper style, in all cases, was as follows :—“ Issues in the cause in which A. B. is pursuer, and C. D. is defender.” Juries did not understand what was meant by “ suspender or complainer.”

January 18.—LORD ARDMILLAN.

NELSON v. PEARSON AND JACKSON.

*Dilatory Plea*.—Where it was objected to the title of a pursuer (who sued as administrator-in-law for his wife), that the parties were not married,—held that this was not a proper dilatory objection, but must be reserved for probation as a question of merits.

January 18.—LORD MACKENZIE.

M'KELLAR v. M'KELLAR.

*Death of Party*.—Counsel for the pursuer stated that intimation had just been received of the death of his client, who was resident in Australia ; and, with consent of the other party, moved the Court to discharge the order for trial, which had been taken subsequent to that event, and therefore without authority. His Lordship held that it was unnecessary, in the circumstances, to pronounce any order ; but suggested that a letter should be written to the defender's agent stating the circumstance, which might be lodged in process to preserve evidence of the cause of the failure of the proceedings.

January 20.—LORD JERVISWOODE.

MARSHALL v. MARSHALL.

*Entail—Approbate*.—In this action, which was a declarator of freedom from the fetters of the entail, it appears that the deeds were defective in certain of the statutory solemnities. It was maintained, however, that, even supposing the entails to be defective, the pursuer could not insist in the present action, because taking benefit through the trust-disposition of James Marshall, he was either barred from pleading the defects of the existing entails, or was subject to a personal obligation to make a good entail. This argument was rested mainly upon a provision

in the trust-disposition, that the conveyance of the trustees' lands was to be made upon John Marshall and his heirs for the time in possession of the lands of Chapelton, making up a feudal right thereto, and granting "a valid and formal disposition, containing all clauses necessary, to the said lands in precise terms hereinafter mentioned." The case of *Graham v. Lord Lynedoch's Trustees*, March 15, 1853, was quoted as supporting the argument, that the obligation to insert all clauses necessary included all clauses necessary to make an entail effectual by the law of Scotland. The Lord Ordinary held, however, that the provision in the settlement referred merely to those clauses necessary to a valid and formal disposition, and that the words which follow, "in precise terms hereinafter mentioned," were to be read as words of limitation of the general directions.

#### APPEAL IN THE HOUSE OF LORDS.

DOLPHIN *v.* ROBINS.

*Divorce—Scotch—Husband and Wife—Domicile.*

(4 August, 1859; 7 W. R. 674.)

In the year 1822, Mr Dolphin, an Englishman, domiciled in England, married Mary Ann Payne, an Englishwoman, at St George's, Hanover Square. He and his wife afterwards lived together at different places in England, and there was issue of the marriage one child only, who died shortly after its birth. In the year 1839, differences having arisen between the appellant and his wife, they separated, and deeds were then executed whereby provision was made for the separate maintenance of the wife, then Mary Ann Dolphin, for her life; and it was agreed that the trustees named in the deeds should hold certain property therein specified upon such trusts as the said Mary Ann Dolphin, notwithstanding her coverture, should from time to time declare, direct, and appoint. Mary Ann Dolphin died on the 28th September 1856, and in the following year the respondents propounded in the Court of Probate certain papers purporting to be her last will and a codicil thereto, both dated on the 11th April 1854, whereby she appointed them to be her executors. But before this, in the month of February 1854, Mr Dolphin left England and went to Scotland, where, in July following, a divorce was obtained at the instance of the wife, on the ground of adultery. After this decree for a divorce, namely, in October 1854, Mrs Dolphin was duly married in Scotland to Amedee Theodore Daviesies de Pontes, a General in the French army, and they thenceforth lived and cohabited together as man and wife, and took up their permanent residence at Paris. In 1856 she made another will, valid by the law of France; and the question was, whether that will was valid. The learned judge of the Court of Probate rejected this allegation of the appellant, on the ground that it stated no case impeaching the validity of the will of 1854, propounded by the respondents. The Court of Probate was of opinion, that the English marriage was not dissolved by the Scotch divorce, and that so the deceased remained up to the time of her death the wife of the appellant, whose domicile was and had always been in England; that his domicile was her domicile; and that the will, or alleged will, of June 1856, not having been executed in the mode required by our laws, had no effect on the will and codicil of 1854. He further held that the Scotch decree did not operate as a divorce *à mensâ et thoro*, and so made a decree rejecting the allegation. On appeal, the House of Lords affirmed the decision. Lord Cranworth said—"On the first question, the validity of the Scotch divorce to dissolve the English marriage, the decision in *Lolly's case*, Rus. and R.C.C. 237, is conclusive. It was contended in the argument here that *Lolly's case* did not necessarily govern that now under consideration, for, that since that decision, the principles applicable to this question have been materially changed by the statute 9 Geo. IV. c. 31. But this

seems to me altogether a mistake. In *Lolly's case* it appeared, that he, having been married in England, afterwards went to Scotland, and while he was there, not having become a domiciled Scotchman (for that must be assumed to have been the state of the facts), his wife obtained a Scotch decree for a divorce on the ground of adultery committed by him in Scotland. After the decree was pronounced he returned to England, and married a second wife at Liverpool. This was held by the unanimous opinion of the judges to be bigamy, on the ground, 'That no sentence or act of any foreign country or state could dissolve an English marriage *à vinculo matrimonii*,' meaning, I presume, could dissolve the matrimonial *vinculum*; and that no divorce of an ecclesiastical court was within the exception in 1 Jac. 1, c. 11, s. 3, unless it was the divorce of a court within the limits to which the 1 Jac. 1 extends. The exception in the statute 1 Jac. 1, was, 'of any person divorced by sentence in the ecclesiastical court.' It was contended here that the decision might have been different, if the case had arisen since the 9 Geo. IV., c. 31, which repeals the statute 1 Jac. 1, c. 11; and by s. 22 again makes bigamy a felony; but with a proviso, that the enactment shall not extend to any person who at the time of the second marriage shall have been divorced from the bonds of the first marriage. It was said that the Scotch Court was not the ecclesiastical court contemplated by the statute 1 Jac. 1; and that so Lolly was not within the exception contained in that statute, but that, as he had been in fact divorced, he would now have been within the proviso of the statute of 9 Geo. IV., c. 31. This, however, is evidently a mistake. He was not, and could not, be divorced; for, according to the express opinion of the judges, no court can dissolve the bonds of an English marriage. *Lolly's case* has been frequently acted on. In *Conway v. Beasley*, 3 Hagg. 642, Dr Lushington, after much consideration, acted on it, treating it as settled law, where there is no *bona fide* domicile in Scotland, meaning by '*bona fide* domicile' a real domicile, and not a domicile assumed merely for the purpose of giving jurisdiction; and I believe your Lordships are all of opinion that it must be taken now as clearly established that the Scotch Court has no power to dissolve an English marriage, where, as in this case, the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch Courts, gives them jurisdiction in the matter. Whether they could dissolve the marriage if there be a *bona fide* domicile, is a matter upon which I think your Lordships will not be inclined now to pronounce a decided opinion. On the other point, decided in the Court below, I think there can be no doubt. If the Scotch divorce did not operate as a dissolution of the marriage, it clearly did not operate as a divorce *à mensâ et thoro*. It was not intended so to operate, and it is by no means certain that the deceased would have desired to obtain such a decree. It appears, therefore, to me that, on both the points raised in argument before him, the learned judge below was clearly right. But on the argument here, a new point was started. It was contended that, without any dissolution of the marriage, or any divorce *à mensâ et thoro*, the deceased was, by the acts of the husband, appearing on the allegation, placed in a situation enabling her to choose a domicile for herself separate from that of her husband; and that, in fact, she did choose Paris as her domicile, and there lived and died; that when so domiciled she made the will of the 23d June 1856, valid according to the law of the place of her domicile, which therefore ought to have been admitted to proof; or at all events, that as her domicile was, at her death, French, the English will and codicil ceased to be operative. On the part of the respondents, it was argued that even if there had been a divorce *à mensâ et thoro*, the wife could not have acquired a domicile of her own. And in support of that argument, reliance was had on the clear and undoubted doctrine of our law, that husband and wife are to be treated as one person—that their union, whatever decree may have been made by the ecclesiastical court, is by the common law absolutely indissoluble—that the wife can neither sue nor be sued without her husband—that the husband is bound to maintain her, and afford her a home—that, with refer-



ence to the poor laws, her settlement is her husband's settlement—and generally, that in the eye of the law they are so completely identified, that the notice of her acquiring a separate home could not for a moment be admitted. I desire not to be taken to adopt this argument at once, to the full extent to which it was pushed. If in this case the deceased had obtained a divorce *à mensâ et thoro*, and had then gone to Paris, and there established herself in a permanent home, living there till her death as the wife of General de Pontes, I desire not to be understood as giving any opinion on the point, whether in such a case her domicile would or would not have been French. The question where a person is domiciled is a mere question of fact. Where has he established his permanent home? In the case of a wife, the policy of the law interferes, and declares that her home is necessarily the home of her husband. At least it is so *primâ facie*. But where by judicial sentence the husband has lost the right to compel the wife to live with him, and the wife can no longer insist on his receiving her to partake of his bed and board, the argument which goes to assert that she cannot set up a home of her own, and so establish a domicile different from that of her husband, is not to my mind altogether satisfactory. The power to do so interferes with no marital right during the marriage, except that which he has lost by the divorce *à mensâ et thoro*. She must establish a home for herself in point of fact; and the only question is, supposing that home to be one where the laws of succession to personal property are different from those prevailing at the home of her husband, which law, in case of her death, is to prevail? Who, when the marriage is dissolved by death, is to succeed to her personal estate—those entitled by the law of the place where in fact she was established, or those where her husband was established? On this question it is unnecessary and it would be improper to pronounce an opinion; for here there was no judicial sentence of divorce *à mensâ et thoro*; no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out that the conclusion at which I have arrived in the case, now under discussion, would afford no precedent in the case of a wife judicially separated from her husband; for, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion that without such a decree it must be considered that the marital rights remain unimpaired. It was indeed argued strongly, that here the facts show that the husband never could have compelled the wife to return to him. The allegation of the appellant, it was contended, contained a distinct averment, that the husband had committed adultery; and this would have afforded a valid defence to a suit for restitution of conjugal rights, and so would have enabled the wife to live permanently apart from her husband, which, it is alleged, he agreed she should be at liberty to do. But this is not by any means equivalent to a judicial sentence. It may be that where there has been a judicial proceeding enabling the wife to live away from her husband, and she has accordingly selected a home of her own, that home shall, for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture. But it does not at all follow that it can be open to any one after the death of the wife to say, not that she had judicially acquired the right to live separate from her husband, but that facts existed which would have enabled her to obtain a decree giving her that right, or preventing the husband from insisting on her return. It would be very dangerous to open the door to any such discussions; and, as was forcibly put in argument, if the principle were once admitted, it could not stop at cases of adultery; for if the husband, before the separation, had been guilty of cruelty towards the wife, that, no less than adultery, might have been pleaded in bar to a suit for restitution of conjugal rights. It is obvious that to admit questions of this sort to remain unlitigated during the life of the wife, and to be brought into legal discussion after her death, for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper."

THE

# JOURNAL OF JURISPRUDENCE.

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## PENAL LEGISLATION A SOURCE OF CRIME.

THE effect of recent statutes in creating new offences, to be punished criminally, has seldom if ever been looked at, in connection with jurisprudence, or with the increase of crime, in so far as that increase may be deduced from the number of commitments to prison; and yet it is capable of proof, that every new offence created by statute must, at least when the Act is first put in operation, cause an increased number of commitments. This and many other curious facts have been suggested to us by the perusal of a table of commitments to the prison of Aberdeen, prepared by Sheriff Watson, and classified according to the supposed motives which led to the different classes of offences. The table, as a whole, from its bulk and very minute details, extending over many years, would not be suitable for our pages, but we propose to notice some of its more remarkable results. In order to avoid undue complexity, we shall take only the eight years from 1851 to 1858, both inclusive, and divide them into four periods of two years each.

As one instance of new criminal offences created by recent statutes, exhibited by this table, there were *nine* commitments under the Reformatory School Acts in 1855 and 1856, and sixteen in 1857 and 1858. Those who do not look beyond the surface would say, "See how much more criminal the people of Aberdeen are becoming; here is an increase of twenty-five offences, and of a kind not to be found in any earlier year." But there being no law applicable to such cases in the earlier years, there could be no transgression. Deducting these offences, there is a remarkable degree of uniformity in the commitments during these four periods of two

years each. We doubt whether any business in Aberdeen has been carried on with the same degree of uniformity during the same period as the business of crime. In the first *two* years, the total number of commitments was 1401; in the next two, 1478; in the third period, 1492; and in the last two years, 1567. Now, the population must have increased at the rate of three per cent. during each period of two years; and if the same per centage be successively added to the amount of crime during each of the first three periods, the result will be, that crime has increased very nearly in the ratio of the increased population.

While the general result is thus uniform, there is by no means the same degree of uniformity as respects the different classes of crimes. The crimes classed by the learned Sheriff as proceeding from "malevolent motives," show these results: Murder and culpable homicide for the four periods, 3, 8, 4, and 1 respectively, indicating a considerable improvement in the most serious class of offences during the last eight years. The same remark applies to "rape and assault with intent," the commitments being respectively one for the first two years, four for second, and none during any of the last four years. Those classed by the learned Sheriff under the head "concupiscent," including "concealment of pregnancy and abortion," unhappily show an opposite result. During the first two years there were five commitments of this class; during the next two, none; but during the third period there were seven; and during the fourth period, three. Those classed as "malevolent" ("fire-raising and attempt at") likewise show a change for the worse. There were no cases of this class during either of the first two periods, and yet there were seven cases during the third period, and three during the fourth. The "malicious mischief" class also shows a change for the worse, the numbers having been respectively, 20, 0, 44, and 36, for the four periods.

In the various classes described as "Acquisitive," there are inextricable contradictions respecting the different descriptions of cases. Thus "robbery" shows an immense improvement, the numbers being 19, 14, 9, and 3; while of "cattle and sheep-stealing" cases, the numbers are 2, 8, 14, and 4. "Theft by housebreaking" is on the increase: the numbers are 24, 12, 21, and 27; but "theft by opening lockfast places" appears to have become extinct: the numbers for the first two years were 9; for the second, 21; and none for the third or fourth period. In the ordinary class of thefts there is a

considerable decrease, the numbers being respectively 651, 691, 592, and 527. The "resetters," on the other hand, appear to be a numerous and increasing class, the commitments being 11, 19, 25, and 15. "Forgery and uttering" follow in the same track; the numbers are 5, 2, 4, and 8. "Breach of trust" goes on very steadily, the numbers being 12, 9, 11, and 9. "Fraud" is equally steady, except for the last period, when it has increased. The numbers are 38, 32, 31, and 42.

The cases classed by the learned Sheriff as "resulting from intemperance" show a melancholy increase, which more than neutralizes the decrease under all the other heads. These cases are "breaches of the peace" and "assaults." The aggregate numbers for the four periods of two years each are respectively 567, 598, 672, and 862. These figures show a sad falling off in the peaceful habits of the metropolis of the north, and the county of which it forms so large a part. A good deal of light is thrown on the probable causes of this extraordinary increase, by the very small number of commitments for "breaches of the Excise laws." The total number of commitments of this class during the four periods of two years each, has been only 6, 4, 0, and 3 respectively. It is obvious from these figures, that the officers of Excise, the procurators-fiscal, sheriffs, magistrates, and justices of the peace, have held nearly sinecure offices in so far as regards the punishment of Excise law offences; and that they have preferred, in place of nipping crime in the bud, to wait, as the officers of police in London did in former times, till crimes of a more serious kind were committed, when the criminals were in due course laid hold of, and punished according to law.

The "miscellaneous cases" show no remarkable results. The Game Law commitments are respectively 20, 21, 29, and 12. The commitments for offences under the Poor Law Act (many of them under recent statutes), are respectively 8, 35, 22, and 13. But for the great increase in the cases of breaches of the peace during the last four years, and more especially during the last two years, the result of the whole commitments would have shown a large decrease in the amount of crime; but the increase in cases arising from intemperance has, as we have shown, more than counterbalanced the decrease under all the other heads. Facts like these show the great practical value of properly classified returns of criminal offences; and that, without them, it is impossible to draw any safe conclusion respecting the increase or diminution of crime; and we hope this first and

most interesting attempt at a proper classification, by Sheriff Watson, will be followed up in other quarters.

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#### FURTHER REFORM IN TITLES TO LAND.

It is not probable that the Legislature will remain content with what it has already accomplished in reforming the law. The path upon which it has entered is beneficial to the community, and is one in which all parties may compete with a generous rivalry for the public welfare. There is still much to be done in all departments of the law, and especially is there yet room for further improvement in conveyancing. Every year the traffic in heritable property is becoming more extensive. Purchases are made much more freely than formerly for the sake of temporary investments; and we believe that if titles were still more simplified, and the transfer of property accordingly cheapened, the commerce in land and houses would reach dimensions hitherto scarcely even anticipated. The Titles to Lands Act was a great step in the right direction, and probably did as much, and went as far, as the country was at the moment inclined for. There are always many prophets of evil ready with their dismal criticisms upon measures which deal even gently with abuses, and their prognostications have invariably some weight with those whose interests are to be affected by the reforms. The law reformer ought therefore to be especially cautious, for he deals with great interests, and lays himself open to the opposition of the timid, the factious, and the interested, as well as of the illiberal of the community. When, however, one reasonable step has been taken, and the result has been shown to be beneficial, that is not a reason for pausing in the course, but is of all arguments the strongest and most convincing for further progress. This is what induces us to believe that the present Government will in all probability bring in a measure to supplement the Titles to Lands Act. There may seem, to the superficial observer, to be something savouring of rivalry in this anxiety of successive Governments to act the part of law reformers; but even if it were so, it is an honourable rivalry, and one which results in benefit to the country. We do not refer merely to the expected bill to place lands held burgage in the same position as others, but to a measure which will go deeper into the feudal system than anything yet proposed.

The Titles to Lands Act, besides simplifying and shortening the style of writs from the superior, contained clauses providing the means by which mid-superiorities might be relinquished. A large portion of the public are prepared to go much further, and to support such compulsory arrangements as shall entirely set aside the feudal character of our system. No doubt this must be the ultimate aim of legislators; for the traffic in land can never be free until it

can be said to belong wholly and solely to one proprietor. At present there may be two, three, half a dozen, or twenty proprietors, all having their distinct, and it may be nominal, interest in the same piece of soil,—a series of middle-men who cannot be shaken off or set aside. One is amazed how such a system could have gone on side by side with the much more excellent system of England, without being modified. It shows how completely stagnant Scotland must have been in all such questions from the Union down to a date within living memory. But the time has now come for progress, as not only is the profession ripe for gradual improvement, but the public beyond are determined to have cheap conveyancing, as well as penny newspapers or French wines. Let none of our more antiquated and timid readers be startled. We do not propose that the relation of superior and vassal should be at once abrogated, and a commission appointed to fix the value of feu-duties and casualties, which the superior would be compelled to accept of as compensation for his rights. Such a proposition will be made in good time, and at no distant date. But we should prefer that the great change should be accomplished gradually, and not in the sweeping summary way which some of the more radical reformers might prefer. We discussed this subject two years ago; and already one decided step has been taken which brings us far on the way. The superiors' titles have been roughly handled, and reduced to much more reasonable dimensions than before. The sacredness of centuries has thus been destroyed, and the way opened for further improvements. It is now contemplated, we believe, to introduce a measure which will save the vassal taking out titles from his superior at all. The writ of confirmation, the writ of resignation, and the writ of *clare constat*, will soon follow their venerable sister, the instrument of sasine, to the tomb. And in sooth they are of no use here, except to create expense and delay to clients; irritation, vexation, and, in the end, little profit to agents. Now that these documents have been reduced to the mere shadow of their former selves, it would almost be an act of mercy to put them out of pain. At least, the writ of confirmation is but a sad substitute for the charter, in the eyes of un-reforming bigoted old gentlemen, who used to consider the crackle of parchment as the sweetest of music. The charter of resignation has had a longer tenure of existence than was intended, from an error having crept into the clause which provided for the effect of the writ which was to take its place, and this has accordingly prevented the final extinction of the charter. But it is a merely temporary respite, and both of the modes of entry may be considered as similarly curtailed to the smallest possible dimensions. The question may be asked, whether there is any practical grievance, now that the style of the writs has been simplified and shortened? Such a question may be very easily answered. It is against good policy to have the conveyance of land hampered with any unnecessary burdens or restrictions;

and although the writs substituted for the old charters are in every sense vast improvements, they still create expense and delay. When a property is sold, the first thing the purchaser's agent does, is to see whether the seller is "entered" with the superior. If not, then the seller must either enter, or an arrangement be made under which the superior undertakes to enter the purchaser. The first difficulty may be to find the superior, because, occasionally, the feu-duty may be some nominal sum of one shilling per annum, which has not been collected for many years, and the parties be unable to tell who the superior is, or where he may be found. Assuming, however, that he is known, the titles must be sent to his agent, who, after expending the usual amount of ingenuity, writing the usual number of letters for explanations, and wasting the usual number of weeks, sends the draft of the writ to the purchaser's agent, who revises it and sends it back to the agent for the superior. In due time notice is received that the writ has been signed, and will be delivered on payment of the fees, which may be very heavy. Independent of the mere money burden, the delay and annoyance thus occasioned is often intolerable, especially in commercial cities, where the exigencies of business frequently require that property be transferred with rapidity. And all this must be gone through where the pecuniary interest of the superior in the subject does not exceed one shilling, or ten shillings, or a pound. Clearly there is something here which requires further reform; and the Government will receive very wide support, if it should bring forward a measure to render entry with the superior unnecessary. This is a very different proposal from that which would alter the relation of the superior to the land. Anything which touches upon the peculiar nature of the property held by the superior would be a more difficult and delicate subject; but the "entry" is, after all, a mere question of title, which may be dealt with on precisely the same principles as have already received sanction in the various recent Acts.

The rights of the superior must be protected in any change of this nature. He has at present a check over the vassal with regard to the casualties, when the vassal, or his disponee, is compelled to take out a title. And provision must be made in any measure such as has been suggested, to give the superior an equivalent. What this equivalent ought to be is a matter for arrangement: probably the feu-duty and casualties may be stated as real burdens on each conveyance or assignation of the property; and by making registration compulsory, the superior could always, by an inspection of the register, discover the various transferences. He could not, indeed, from the Register of Titles, discover whether any casualty was due by the death of a vassal, but by the published List of Services of Heirs he could have no difficulty in tracing his rights. It may be assumed that a casualty would be of very small amount if the superior did not discover when it was exigible; and even if, under any possible or conceivable system to take the place of the

present, the superior was required to look after his own debtors, it is doubtful whether the Legislature would consider such an arrangement as a hardship. At least any hardship to him seems very visionary, compared to the annoyance, delay, and heavy pecuniary burden upon the vassal of taking out titles. The country will not stand this antiquated and meaningless system much longer; and if the question is to come to this, whether the superiors are to be put to a little additional trouble in looking after their own casualties, or the whole land rights of the country to be subjected to a serious burden, we may, without any gift of prophecy, venture to predict what the decision of the Legislature will be. If, therefore, any bill should be shortly introduced—and if not brought forward by Government, a measure will in all likelihood be laid on the table by a private member—we would seriously counsel superiors and those interested on their side of the question, not to attempt, by any cry of vested interests, to deceive themselves into the belief that nothing will be done. They ought rather to endeavour to adjust the best mode of preserving the substantial part of their own rights, while giving the public the relief to which they are entitled.

The great end which is desired by legal reformers is, that a series of conveyances for the prescriptive period shall be considered a complete title, without reference to the superior at all. We are borne down at present by a technical system, which is out of place in a commercial age,—a system which may have excited the wonder and delight of practitioners a hundred years since, but which has accomplished its mission, and must now give place to something more in keeping with the times. We appeal to every lawyer who has had transactions to carry through involving the completion of titles, whether it is not a most difficult matter to convince his client as to the propriety or necessity of the step. It seems so extraordinary that a house or piece of land which belongs to A should not be permitted to pass to B for a price, without a reference in some shape or other to C, whose sole interest in the house or land may be nominal, but whose agent must nevertheless be paid a handsome sum for a title. Clients on these occasions frequently express their opinion that they have fallen among thieves, and that the title from the superior is taken out, not because such a course was necessary, but because the lawyers thought it profitable for themselves. The granting of the title puts nothing into the superior's pocket. His duties and casualties he may obtain without enjoying the antiquated and worthless honour of being a feudal lord. It is not to the money payments to the superior to which the public object, but to the pile of technicalities to which these payments give rise. Nor is the system even profitable to the lawyer. His class sinks in public esteem for every rag of old form which is thus left unremoved, and the public esteem means emoluments. The gains of the profession will not increase, but steadily diminish, with the growth of intelligence and education, unless men can be persuaded that lawyers



look first to the good of their clients, and only to their own remuneration so far as they confer benefits upon those who employ them. The great proportion of the profession, we believe, understand, and are willing to act upon those principles, as they have approved all the recent steps in reform legislation. But apart from those higher considerations, the system is not profitable for the lawyer, as it discourages investments in and transferences of heritable property. A feeling has long existed that it is dangerous and costly to invest for temporary purposes in land, in consequence of the intricacy of the titles. The transaction too, in place of being done in a forenoon, is kept hanging up for weeks and months, to the great disgust of men who are accustomed to invest thousands in the stocks without either expense or delay. We are not utopian enough to expect that land will ever, in all respects, occupy the position of moveable property, but at present it occupies anything but a favourable position, in consequence of the feudal technicalities with which it is surrounded. A disposition is springing up to invest more largely in heritable property for temporary purposes; and if such reforms as we have suggested were carried out, so as to make the public more confident, and the transactions less complicated and more speedily settled, the result would be better for the legal profession than any attempt to retain the expediting of writs from the superior.

We confess that there are many and grave difficulties in the way of the change now suggested. The superior is a proprietor, and a proprietor having powers of no ordinary kind for concussing refractory vassals. Superiorities are rather a favourite investment; and would the Legislature touch rights so venerable, so well understood, and so valuable? To constitute the feu a real burden preferable to all others on the land, might secure it safely enough; but what compulsor would the superior have on the vassal if "two years were to run into the third unpaid." Is he to have the remedy of declarator of irritancy *ob non sol. can.*? and if not, by what other known process in law will the superior have an equal command over what is due to him? How can a casualty such as a double feu at the entry of heirs and singular successors be created a real burden, in the sense in which we at present construe the words, when it only becomes exigible periodically? And then, are there not casualties which are even more uncertain, but which superiors may consider not less valuable? These questions can only be met by the answer, that it is clear no satisfactory change can be made without altering the remedies which the superior presently possesses. But remedies are not rights; and if to bring conveyancing more into harmony with the age, the Legislature jealously respects the rights of the superior, he may anticipate considerable change in the mode of making these rights effectual. The existing remedies are as unsuited to modern ideas as the titles which a vassal is compelled to take out. Actions of the kind indicated are getting less frequent every day, and we cannot believe that superiors would gravely pro-

pose to the Legislature to re-enact in the year 1860, that if two years' feu-duty should run into the third unpaid, that the vassal should lose his right to the feu. While such a remedy is unsuited to modern ideas, its stringency undoubtedly tends to give superiorities a great value; and probably the loss of such rights might be fairly pleaded by superiors as a reason for giving to them an increased feu-duty, if it was to be placed on the footing of a real burden, and not a right of property. This mode of providing an equivalent is not to be overlooked; and looking at the vast advantages which vassals would gain by what we have proposed, they could scarcely refuse to agree to some small increase in their payments. What the amount of increase ought to be is matter of calculation, and need not now be gone into; but we are satisfied that a well-considered measure, based on this idea, would not excite any great opposition. It would give to feus practically all the advantages attainable under freehold tenure, without subjecting the owner to the annoyance and expense of making up a title under the Crown. It would be a measure only second in importance to the Heritable Jurisdictions Act, and would confer lasting honour on any statesman who had the courage to introduce it, and the good fortune to carry it successfully through Parliament.

The proposition is in itself too reasonable not to have supporters everywhere; and the feudal party, if such a designation can apply to any portion of our countrymen, would have little sympathy in the House of Commons. As we have more than once pointed out, the ideas generally prevalent in that quarter, as to the transfer of land, are even more sweeping than any one in Scotland has yet ventured to broach. The great leading idea of many is to have the property of the country, as presently distributed, delineated on vast parochial plans, to which reference might be made in the conveyance; and that the conveyance, being the only title connected with property, should simply bear, "I, A., sell to you, B., for L. , the house and piece of ground, marked No. 32 on the Government plan, of the parish of X. Y. In witness whereof." No doubt a deed of this description would have the charm of brevity and simplicity; but perhaps simplicity may be found to be the ruling characteristic of those who believe in the practicability of the scheme. However, such are the proposals which are fermenting in men's minds, no doubt stimulated and encouraged by the clumsy and absurd methods of conveyancing now in force. The way to kill extravagant theories is to promote moderate and useful reforms; and as the system which we have exposed in this article is a fruitful source of annoyance and expense in Scotland, it is to be hoped that all parties will approach the consideration of the remedies with an anxious desire to promote the public well-being.

## NOTES IN THE INNER HOUSE.

## FIRST DIVISION.

*Lindsay v. The London and North-Western Railway Company.*

THIS case has been the means of throwing considerable light on a subject very little treated of by our authorities, viz., arrestment *jurisdictionis fundandæ causa*. The facts of the case were very simple:—

The action was raised by the pursuer, who is a fruit merchant in Edinburgh, against the defenders, who are common carriers in England, to recover damages from the latter for loss alleged to have been sustained through their breach of obligation. In order to found jurisdiction against the defenders, the pursuer used arrestments in the hands of the Caledonian Railway Company. The subjects arrested were (1.) certain stock of the Caledonian Railway Company held by or for the defenders; (2.) certain trucks and carriages of the defenders in the custody of the Caledonian Company; and (3.) sundry sums of money due to the defenders, as their share of the joint traffic of the lines, then in the hands of the Caledonian Company. The First Division held that, in the event of its appearing that funds belonging to the defenders had been duly arrested within Scotland *jurisdictionis fundandæ causa*, the Court had jurisdiction to entertain the action. This judgment was affirmed by the House of Lords. The defenders then maintained that “no funds belonging to them had been competently arrested in the hands of the Caledonian Company, and that the arrestment used was inept to found jurisdiction.” A proof was accordingly allowed, and the Court (altering the judgment of the Lord Ordinary) held it proved that funds and effects belonging to the defenders had been duly arrested within Scotland *ad fundandam jurisdictionem*, and therefore sustained their jurisdiction.

The civil law did not recognize any jurisdiction of the nature of that now under consideration, and our earlier institutional writers, Balfour, Stair, Bankton, are silent upon it. During the 17th century, however, the Scottish courts borrowed the practice from the Dutch, among whom it had been for some time established (see John Voet, ii. 4, secs. 22–25). The policy of the courts in sustaining such a jurisdiction unquestionably was to facilitate the recovery of debts arising in the course of trade with persons abroad. This requires to be borne in mind in considering the extent of the jurisdiction and the character of the actions which may be brought under it.

1. The object of the arrestment is not to obtain security or satisfaction for debt, but solely to subject the foreign defender to the jurisdiction of the courts of this country (*per* Lord President M'Neill). The moment, therefore, that the foreigner appears in the

action, the *nexu*s laid on his goods flies off. From this, it follows that such arrestment can have no effect in competition with ordinary arrestments. For that purpose, after the jurisdiction is founded, the creditor must raise an action against his debtor, on the dependence of which he may arrest in common form.

2. The subject of the arrestment must not be illusory. Lord Hailes was therefore wrong in saying, in the case of *Scruton*, 1 Dec. 1772, that "it matters not whether the subject arrested be a bag containing a thousand guineas, or a single toothpick, at a penny the dozen." An unliquidated debt, or unascertained balance, may, however, be arrested so as to found jurisdiction (*Douglas v. Jones*, 1831, 9 S. 856).

3. The jurisdiction founded by arrestment is not universal. It entitles the courts of this country to sustain some actions against foreigners, but not to sustain others. Voet says (xiii. 2, secs. 4, 25), it extends to all personal actions in which the defender is bound "ad dandum faciendum et præstandum." In other words, it extends to all personal petitory actions, or actions of which the conclusions can be enforced by means of an arrestment on the dependence or on the decree. Accordingly, in the case of *Scruton* above mentioned, the Court refused to entertain an action of declarator of marriage against an Irishman, though arrestment *jurisdictionis fundandæ causæ* had been used against him. And so in regard to all questions of *status*, and such like, the general rule *actor sequitur forum rei* will obtain. Were it otherwise, most serious conflicts might arise between the courts of this and other countries, through the excessive use of a device introduced merely for the convenience of mercantile persons. It would, perhaps, be going too far to say that no declaratory conclusions could be sustained under this species of jurisdiction, but certainly they would only be sustained if introductory or ancillary to proper petitory conclusions.

4. If the foreigner appear, or give caution *judicio sisti*, the jurisdiction of the Court will not be limited to the amount arrested in order to found jurisdiction; if he do not appear, the jurisdiction will be measured by the amount arrested. This is clearly the doctrine of the text writers. Thus Story says (*Conflict of Laws*, p. 898), "If the defendant has never appeared and contested the suit, it is to be treated to all intents and purposes as a mere proceeding *in rem*, and not as personally binding on the party as a decree or judgment *in personam*." When the case under consideration was before the House of Lords (23 Feb. 1858), their Lordships expressed no opinion upon this point. But the First Division, when the case came again before them, gave very decided opinions upon it. The Lord President said that no Scottish lawyer had ever doubted the doctrine as it is above stated; and Lord Ivory, plainly having the language of Story in his eye, said, "Confusion had sometimes been made between processes in absence and processes in *foro* in regard to this matter. When the party appeared the decree was taken in

*personam*, and if good for a shilling was good for a pound. If he did not appear, the decree would not be good beyond the subjects attached."

Such appear to be the more important rules in regard to this extraordinary kind of jurisdiction. It has been found very convenient in practice, but being obviously an exception to the general principles which regulate this branch of law, it ought to be exercised within well-defined limits, and never pressed beyond very clear precedents.

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#### SECOND DIVISION.

*Adamson v. Clyde Navigation Trustees*—27th January 1860.

THE inspector of the poor of the City parish of Glasgow sued the Clyde Navigation Trustees for poor rates, on the ground of their liability to be assessed under the provisions of the Act 8 and 9 Vict., cap. 83, in respect of lands and heritages belonging to and occupied by them, situated within the parish. The defenders pled right to a total exemption,—the plea stated in defence being, that any property vested in them having been vested in them as trustees for public purposes, and the revenues derived therefrom, and from the trust under their management, having been all appropriated by statute to specific public purposes, among which the payment of poor rates was not included, they were entitled to *absolvitor*.

The grounds of this plea resolve into two heads—1st, That the free annual revenues are applicable solely to the improvement of the subjects; and, 2d, That the subjects themselves are held solely for public purposes, namely, the purposes of trade and navigation, in which the whole members of the public are equally interested. By statute the revenues of the trust are appropriated to the maintaining and improving of the harbour, docks, and navigation of the River Clyde, and to paying the debt which has been contracted in the formation of the works. There being thus no diversion of any part of the revenues for the benefit of any individual or corporation, it was argued for the defenders that the subjects had no value with reference to which an assessment could be made. The case was heard before all the judges, who (with the exception of Lord Kinloch) unanimously repelled the defence. This decision determined nothing as to the mode in which the assessable value of the property should be ascertained. The opinion of the Lord Justice-Clerk went on the general principle, that there is no exemption from taxation, general or local, of any property in this country except Crown property, that is to say, property belonging to the State, or devoted to State purposes. This proposition seems to be sound in principle, and to afford the best, if not the only practical, rule for ascertaining the liability of property to taxation. The principle that property is entitled to exemption from taxation, provided its revenues are devoted to public purposes, in the sense contended for by the Clyde

Trustees, would, if adopted, involve considerable practical difficulty and unfairness in its operation. In carrying it out it would not be easy to limit its application, or to draw the line between institutions really public and of public benefit, and those which, under cover of a public character, were in reality of private or local benefit, or even injurious to the public. In one sense, all institutions for the public benefit, and to which the public are admitted on certain conditions of payment or otherwise, and in which no private party has a pecuniary interest, may be said to devote their revenues to public purposes. It would be unfair, however, to exempt such institutions from taxation, because, from their local character, and from the conditions under which their benefits can be taken advantage of, the general public cannot be said to be benefited by them. Adverting to the case in hand, although the Clyde Trustees, in one sense, hold their property and employ their revenues for the benefit of the whole naval and mercantile world, who may, if they please to comply with certain conditions, make use of the river and harbour, still the trustees cannot be said to hold their property for behoof of the whole public, but only for that portion of the public who are in a position to take advantage of their works, and who can afford to pay the dues levied for such enjoyment. As was remarked by some of the judges, the mere fact that every one might enjoy the right on complying with the condition of payment, did not place the defenders in a different position from the owners of a public inn, a public railway, or a public ferry. And looking at the matter in an equitable point of view, it is but fair that those who frequent the port should, by the increase in harbour dues which would result from the imposition of poor rates, be made to contribute indirectly to the support of that pauperism which is fostered and increased by the trade and commerce which benefit them.

The Poor Law Amendment Act creates no special statutory exemption in favour of any species of property,—the only exemptions being in favour of persons the annual value of whose means does not exceed L.30 (sec. 47), and persons assessed but unable to pay (sec. 42). Sec. 34 provides, that where an assessment is to be imposed, the Parochial Board may “resolve that one half of such assessment may be imposed upon the *owners*, and the other half upon the tenants or occupants of all *lands and heritages* within the parish or combination, rateably according to the annual value of such lands and heritages.” By the interpretation clause, the word *owner* is made to apply to *commissioners* or *trustees* who shall be in the actual receipt of the rents and profits of lands and heritages; and the words “*Lands and heritages*,” are made to include *quays, docks, and wharfs*. From these clauses it would appear that the Clyde Trustees, if not exempt from taxation at common law, or by their own statutes, are certainly not exempted from the operation of the Poor Law Act either by the nature of their ownership or the nature of the property held by them.

Mr Dunlop, in his treatise on the Poor Law, says, p. 96, "It would rather appear that heritable property mortified or appropriated for charitable purposes, or for the use of the poor, and in so far as not occupied beneficially by others, would not be subject to assessment."

In the case of *Bakers' Society of Paisley v. Magistrates*, 6 Dec. 1836, where the assessment had been imposed upon means and substance, it was held that the revenues of the association, so far as devoted to charitable purposes, were not assessable. This decision seems questionable, and it is still more doubtful whether the right to exemption extends to heritable property held by charitable institutions. There is no judgment of the Court upon the point, the only case being that of *Greville v. Beattie*, in which Lord Neaves (whose decision was not reclaimed against) held that property owned as a House of Refuge was assessable.

Whether such institutions are legally exempt or no, the common practice seems to be not to impose the assessment upon them,—a practice which is justified by the common sense rule, that there is no use in taking out of one pocket to put into the other.

The exemption from assessment of parochial manse and glebes was sustained in the case of *Cargill*, 27 Feb. 1816, and more recently in the case of *Forbes*, 18 Dec. 1850 (affirmed 14 June 1852). The principle of the latter decision seemed to be, that this right of exemption being a very ancient privilege, founded on immemorial usage and understanding in the country, it could not be taken away by mere implication, more especially as an express provision is inserted in the statute to make stipends liable.

The manse and glebes of parish clergymen, therefore, constitute an exception to the general rule, that all property but Crown property is liable for poor rates.

Certain institutions also are, in respect of the land and buildings occupied by them, exempt by special statutory enactment; as, for example, societies established exclusively for purposes of science, literature, or the fine arts, provided the conditions of the Act are complied with (6 and 7 Vict., cap. 36).

#### THE LAW MAGAZINES.

THE *Law Times*, apropos of Sir F. Kelly's letter to Lord Brougham, has some sensible observations on the new mania for extinguishing bribery by inquisitorial legislation. We give the argumentative portion of the article :—

An oath is proverbially a frail reliance, as Sir F. Kelly's experience at the bar must have convinced him, and therefore he proposes to surround the oath with other and better securities. He suggests that all payments whatever at an election shall be made by the election auditor, so that the candidate will have nothing more to do than to send him a check for so much money as may be required, the auditor being responsible for spending no part of it in other than legal expenses. The oath is to be as comprehensive as words can make it, em-

bracing the past, the present, and the future, and extending not only to his own acts, but to those of any person on his behalf, with his knowledge. This oath is to be taken by all the candidates at the election, and again by the elected members on taking their seats. The penalties for violation of this oath are the real protectors, the oath being little better than a scarecrow. They are to be nothing less than the penalties of perjury, perpetual incapacity to sit in Parliament or to be an elector. Equally fearful is to be the punishment of others than candidates proved to be guilty of bribery on behalf of any candidate. The punishment is to be imprisonment with hard labour, combined with the like incapacity and disfranchisement.

Sir F. Kelly answers by anticipation the objections that will be raised to his plan. They are the same as have been found in practice to nullify each of its many predecessors.

First, oaths are either worthless or unfair.

They do not bind the unconscientious—the subtle find abundant evasions to quiet *their* consciences; oaths admit the bad and exclude only the good. The unscrupulous man who bribes and swallows the oath will certainly beat the scrupulous man who, out of respect for his oath, will not buy.

Secondly, severe punishments always defeat their own purpose, where public opinion does not sanction them. Everybody must feel that bribery is *not* such a moral crime as robbery, and therefore all parties concerned will shrink from visiting it with the same punishment. Prosecutors will not be forthcoming, witnesses will shut their eyes, judges will find flaws, and juries will not convict. The fact is, and it is useless to ignore it, that it is not deemed a very heinous sin to give a poor man a few pounds for preferring one candidate, equally good with the other candidate, it being otherwise perfectly indifferent to him to whom he should give his vote. No injury is done by anybody by the transaction, and possibly some good; and the public mind will never be brought to look upon this as equal in criminality to housebreaking, and subject it to the same punishment.

Thirdly, what is to be deemed bribery? It will never do to limit this offence to the buying of a poor man's vote by hard cash. This is only one, and by far the least noxious, form of bribery. If a poor man is not a politician, and cares nothing about his vote, no great harm is done by an inducement to a preference; in such case there is no corruption of a conscience, but only the swaying of an indifference. But when persons of a higher class are bought, their consciences are corrupted; they are induced not merely to vote indifferently, but to vote *against* their convictions. The bribery of tradesmen by customers, of professional men by retainers, of one man by the gift of an office to his son, of another by a silk gown or a star, is surely quite as bad as, if not rather worse than, the buying of a poor man's vote with hard cash. There must be no more of the hypocritical legislation that punishes in one class what it sanctions in another. In any new law against bribery, *all* bribery, in every shape, whether by ribbons, places, custom, or cash, must be treated alike.

We are glad to find our contemporary entering a decided protest against that squeamish morality which is seeking to deprive the country of the best safeguard of its liberties, by closing the doors of the courts of justice against the public. In Scotland, where the right of divorce has always existed, the proceedings of the Court of Session have uniformly been conducted in public; nor has it been found that the public advising of divorce cases has been attended with any danger to morals, or has attracted to such discussions any unusual share of public notoriety. The opinion of the *Law Times*, which we quote, will, we feel assured, receive the sanction of all who are conversant with consistorial procedure in this country:—



By the decisive majority of 268 to 83, the House of Commons has rejected the application for closing the doors of the Divorce Court. This is most satisfactory for many reasons, but mainly because it indicates a returning resolve on the part of the popular branch of the Legislature to hold fast by great principles, and not to permit them to be set aside by the plausible but dangerous argument of expediency. There is an unquestioned evil, and here an obvious remedy; and it was natural that persons not accustomed to look far below the surface of things, should crave for the ready cure, heedless of the distant danger that always attends departure from a principle. They would admit frankly enough that publicity was of the highest importance to the due administration of justice, and that it was one of those great principles of the British constitution to which we are indebted for the unequalled liberty that we enjoy. But this, they say, is an exceptional case, and justifies exceptional treatment. They forget that if the principle may be set aside in one case for reasons that appear to them sufficient, it may be in like manner invaded by others for other reasons that appear equally sufficient to others. Morality is the motive to-day; political interests may be the plea to-morrow; and thus the mightiest barrier of liberty against despotism may be broken down, stone by stone, until nothing remains. This is the gravest objection to the demand that has been urged so strenuously and defeated so signally; and if ever the question should again arise, we trust that upon this broad basis of principle it will be again confronted.

The noble mover received some compliments for his supposed motives; but we cannot think them altogether deserved. It is remarkable that he is the leader of the party that signalized itself by its resolute hostility to the Divorce Act while it was in progress, and which is even now actively engaged in endeavouring to procure its repeal. The real objection of this party to the Act was, and is, certain religious views of it, and their purpose therefore is to enforce the results of their particular opinions upon the rest of the community who do not share them. Knowing that Lord John Manners and the party he represents in this question are hostile to the very existence of the Divorce Court, and seeking its destruction, we cannot but look with suspicion upon any movement they make in relation to it; and it is fair to consider that whatever they might propose would be deemed, by themselves at least, as being calculated to damage the object of their undisguised aversion. We cannot doubt that it was thought by them that to close the doors of the Divorce Court would be a step towards shutting it up altogether; and on this account also this signal discomfiture at the beginning of their agitation is a subject for congratulation.

The *Law Magazine* for February contains, in addition to the usual reviews of current literature, a long dissertation on the Law of Blasphemy, suggested by the publication of a paper by Mr W. D. Lewis, Q.C., read to the Juridical Society of London. The writer very properly reprobates that new form of intolerance which, under the guise of protection to the poor, the young, and the ignorant, would proscribe all free discussion on matters of religion, and make opposition to the religion of the State a political offence. In noticing a treatise on Lord St Leonards' Trustee Relief Act (22 and 23 Vict., cap. 35), the *Law Magazine* has the following observations on the case of *Miles' Will*, already noticed in this *Journal*, in which the Master of the Rolls decided, in defiance of the Act of Parliament, that Scotch heritable security was not a legal investment:—

The trust in this case was under an instrument dated prior to the passing of the Act, and his Honour thought the section was not retrospective, so that the Act in no way enlarged the discretion of trustees of existing instruments; his Honour, moreover, without giving any opinion on the effect of the usual final

clause, "This Act shall not extend to Scotland," did not in his discretion think right to advise a trustee to make an investment on Scotch securities.

We apprehend that there can be little doubt that Scotch investments are authorized by the Act; and on the question, whether the 32d section be prospective only, we must observe that those words of futurity, "shall not be forbidden," seem to be used by the Legislature with reference to the future time at which the investment is made, and not to that at which the instrument creating the trust is executed. The form in which the questions arose in *re Miles' Trusts*, prevents that case from being held as a binding authority upon the point, which probably sooner or later will be settled in a hostile suit.

## THE MONTH.

Additional Sheriff-Substitutes—Magistrates' Appeal Courts—Privileges of the Bar—New Bills in Parliament—Agency of Solicitors in Elections—The Budget.

THE events of the last month embrace few transactions of special interest to lawyers; nor is there much in the proceedings of the courts or of the professional bodies that seems to call for special observation. Among matters more immediately interesting to the circle of our provincial readers, we may refer to the appointment of Mr Cunningham-Grahame to the Sheriff-Substituteship at Inverary, which was intimated some time ago. This is in all respects an excellent appointment, and, we do not doubt, will give satisfaction to the inhabitants of the northern district of Argyleshire.

A memorial, which we print in another page, has been lately presented to the heads of the Court, in conjunction with the Lord Advocate, asking for the appointment of an additional sheriff at Dundee. It is admitted on all hands that the business of the Court in that locality is most inadequately performed; and there can be as little doubt that the profession have taken the right means of redress, in throwing the responsibility of any failure in the administration of justice on the hands of the Government. We believe a difference of opinion exists among those who are well qualified to judge, regarding the cause of the delay and difficulty which has been experienced in the prosecution of the business of that Court. Most of the practising members of the profession in Dundee are of opinion that the appointment of an additional sheriff is indispensable, while some remain of opinion that a single active and hard-working judge would be sufficient for the wants of the district. We take for granted that some change must be made, though whether in the way of addition or of substitution, may safely be left

to the proper authorities to determine. On that assumption we have an observation to make—not as a suggestion to Sheriff Logan, whose qualifications for making a judicious choice are undoubted, but rather with the view of enforcing a principle we have often insisted on. In a large and wealthy community like Dundee, there is not a sufficient inducement to men of the highest position among the resident profession to abandon the lucrative employment of a provincial solicitor, and undertake the laborious duties of a county court judge. If an appointment is made from the ranks of the less successful, he is not looked up to by his former professional brethren in the way that a judge ought to be. Besides, it is objectionable in point of principle, to put a man on the Bench who has all his life been in intimate professional relations with many of the clients whose disputes he is now required to decide, and which professional relations are possibly still kept up by his partners or kinsmen. The same objection, it may be observed, does not apply to appointments in the supreme court, because the judge, in his capacity of counsel, has not, as a general rule, come into personal contact with the client, and cannot have anything approaching to the same interest in his success which is likely to be felt on the part of his solicitor.

In our impression of last month we gave a sketch of a Bill for extending to Scotland the machinery of the English Magistrates' Appeal Court. The following specimen of a bill of costs in the Court in question, which we extract from the *Law Times*, shows that the justice administered by these tribunals is recommended by its cheapness, not less than the excellence of its quality. It can hardly be doubted that a great influx of appellate business would be brought into the Court of Session, if a simpler and more summary method of review could be substituted for the present costly and dilatory procedure. The following is the copy bill of costs referred to:—

	£	s.	d.
Drawing application to Justices to state case, and presenting the same (it is very short) . . . . .		0	6 8
Attending your entering into recognisances (not necessary, as appellant can go alone) . . . . .		0	3 4
Paid fees to clerk to Justices :			
Drawing case and copy . . . . .	£1	1	0
Attending settling case, letters, etc. . . . .	0	13	4
		1	14 4
Settling case with clerk to Justices . . . . .		0	6 8
Copy case for respondent . . . . .		0	5 0

Carry forward, £2 16 0

	Brought forward, £2 16 0
Notice of appeal . . . . .	0 5 0
Service of same on respondent . . . . .	0 6 8
Attending Q.B. office to enter case . . . . .	0 3 4
Paid entering . . . . .	0 2 0
Two copies case for Judges . . . . .	0 5 0
Attending lodging . . . . .	0 6 8
Paid . . . . .	0 10 0
Notice to respondent . . . . .	0 5 0
Drawing brief, with copy case and observations . . . . .	0 13 4
Copy brief . . . . .	0 5 0
Attending counsel therewith . . . . .	0 6 8
Paid his fee and clerk . . . . .	2 4 6
Attending court case argued . . . . .	0 13 4
Paid court fees . . . . .	0 4 0
Attending to draw up rule . . . . .	0 3 4
Paid for same . . . . .	0 4 0
	<hr/>
	£7 13 10

A curious question was lately raised at the quarter-sessions of the little borough of Walsall, relative to the right of exclusive audience enjoyed by the English Bar. It would seem that at these courts, whether in county or borough districts, the Bar have hitherto enjoyed a monopoly of practice, unless in the exceptional case of a quorum of barristers not being present, when, in the interests of justice, the Bar was necessarily thrown open to solicitors. Since the introduction of the County Court system has accustomed the English solicitors to oral pleading, it is not surprising that they should wish to have the inferior criminal courts also thrown open to them; and, we confess, their claim appears to us to be just and reasonable. On the occasion referred to, however, they were unsuccessful; the Recorder, Mr W. Johnstoun Neal, deciding, in an elaborate opinion, that he had no power to innovate upon established professional privileges. Our readers are aware that it is the practice in England for counsel to attach themselves to the sessions of some particular county. Without reference to any privilege of pre-audience, we think it might be desirable if some such practice were sanctioned in Scotland. We know that counsel are frequently sent for, at considerable expense, to argue cases at the quarterly sittings in our principal County Courts; and in many cases solicitors would gladly avail themselves of the assistance of counsel, were it the practice for these gentlemen to attend without requiring to be specially engaged at an extravagant fee. In other cases, the old form of review by Reclaiming Petition is resorted to, because the agent, who may not be possessed of a special aptitude for pleading, and may not be able to secure the services of counsel at a moderate

fee for an oral debate, prefers a written argument by counsel, to sending his brief to a rival agent in his own town.

In the legislation of the month we have little to comment upon. There seems to be a singular paucity of Scotch Bills this session. A new bill, entitled "An Act for the Incorporation, Regulation, and Winding-up of Trading Companies and other Associations," has, however, been introduced into the House of Lords by the Lord Chancellor, and is intended, we suppose, to apply to Scotland, and to supersede the machinery of the existing Acts. May not the public, who are interested in the permanence and stability of the mercantile law, inquire what is the meaning of this eternal tinkering at our statutory law? Nobody complains of the existing Act. If it is faulty, let it be amended in the constitutional way, and not by a sweeping repeal, followed by a substantial re-enactment of the old law—a method of legislation in which, we may shrewdly guess, the paid draftsmen of the Government law departments have a stronger interest than any other class of her Majesty's subjects.

Among other results of the anti-bribery furor which has seized upon the House of Commons, an attempt is about to be made to deprive solicitors of the remuneration to which they are so well entitled for their services as election agents. This is, unquestionably, one of the most objectionable features of the Bill recently introduced by Mr Mellor, Q.C., and referred to a select committee of the House of Commons. This proposal must have emanated either from the brain of an impracticable enthusiast, or from the spite of a disappointed candidate smarting under the infliction of a heavy bill of costs, which he is unable or unwilling to pay. Every man conversant with election proceedings knows that the services of paid agents are indispensable; and we should like to know if the real friends of purity of election would seriously maintain that anything is to be gained by taking the management of electioneering contests out of the hands of men acting under a sense of professional honour and responsibility, and devolving them upon individuals of the class represented by Mr Frail and "the Man in the Moon." We are free to admit, that a system has grown up, especially in English burghs, of employing solicitors and others as paid agents and canvassers, rather with a view to obtaining their suffrages as electors, than for *bona fide* services rendered. The remedy obviously is, to disqualify paid agents from voting in the election. This appears to us to be a safe extension of the rule which prevents officers in the

Revenue and other Government departments from voting,—the principle being, that no one should be allowed to vote who is subject to direct *political* (as distinguished from personal) influence. Candidates would then be under no inducement to employ local agents, unless their utility in gaining supporters was so great as to counter-balance the direct and certain loss of their own individual suffrages; and a motive would be furnished for practising economy in what has hitherto been one of the most lavish and reprehensible outlets of electioneering extravagance.

The Budget, which appears to have given such general satisfaction to the mercantile and industrious classes, contains some important alterations in the tariff of stamps. We subjoin a reprint of the principal resolutions proposed by the Chancellor of the Exchequer:—

**HERITABLE BONDS.**—That towards raising the supply granted to her Majesty, money secured on heritable property in Scotland, and money secured by Scotch bonds in favour of heirs and assignees, excluding executors, shall be held and interpreted to be moveable property, and shall be included in any inventory to be exhibited and recorded in any Commissary Court in Scotland of the estate and effects of any person deceased entitled thereto, and in England and Ireland respectively shall be deemed to be estate and effects for or in respect whereof any probate of will or letters of administration shall be granted; and every such inventory, probate, and letters of administration shall be chargeable with stamp duty, in respect of such moveable property.

**AGREEMENTS.**—That towards raising the supply granted to her Majesty, the respective stamp duties now chargeable upon any agreement, or any minute or memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise charged, nor expressly exempted from all stamp duty, where the matter thereof shall be of the value of L.20 or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter put or endorsed thereon, or annexed thereto, shall cease; and in lieu thereof there shall be charged for and upon every such agreement, minute, or memorandum as aforesaid, whether the matter thereof shall or shall not be of the value of L.20 or upwards, the stamp duty of sixpence. And where the same shall contain 2160 words, then for every entire quantity of 1080 words contained therein over and above the first 1080 words, a further progressive duty of sixpence. Provided always, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any of such letters shall be stamped with a duty of one shilling.

**AGREEMENTS FOR LEASES.**—That towards raising the supply granted to her Majesty, every agreement for a lease or tack of any lands, tenements, hereditaments, or heritable subjects, and every agreement, minute, or memorandum of agreement, containing the terms and conditions on which any lands, tenements, hereditaments, or heritable subjects are let, held, or occupied, shall be chargeable with the stamp duty payable on a lease or tack for the term, rent, consideration, and conditions mentioned in such agreement, minute, or memorandum. And any lease or tack of the same lands, tenements, hereditaments, or heritable subjects, afterwards made in pursuance of, and conformably to, any such agreement, minute, or memorandum, which shall have actually paid the

duty payable on such lease or tack as aforesaid, shall not be chargeable with any higher stamp duty than 2s. 6d., exclusive of progressive duty. Provided always, that where any such lease or tack would, but for the last preceding provision, be liable to any higher rate of stamp duty than 2s. 6d. (exclusive as aforesaid), such lease or tack shall not be available unless stamped with a particular stamp for denoting or testifying the payment of the full and proper stamp duty on such agreement, minute, or memorandum as aforesaid, which said particular stamp shall be impressed upon such lease or tack on the same being produced, together with such agreement, minute, or memorandum, and on the whole being duly executed or signed, and duly stamped in all other respects.

**PROBATE DUTY.—POWERS OF APPOINTMENT.**—That towards raising the supply granted to her Majesty, the stamp duties payable by law upon probates of wills and letters of administration, with a will annexed, in England and Ireland, and upon inventories in Scotland, shall be levied and paid in respect of all the personal or moveable estate and effects which any person hereafter dying shall have disposed of by will under any authority enabling such person to dispose of the same as he or she shall think fit.

## Legal Intelligence.

### LEGAL APPOINTMENTS.

**IRELAND.**—Mr Justice Perrin having retired from the Queen's Bench, the Attorney-General, Mr Fitzgerald, has been promoted to the vacant judgeship; Mr Deasy, the Solicitor-General, has been appointed Attorney-General, and Mr O'Hagan has received the Solicitor-Generalship.

**ENGLAND.**—Mr J. Jerwood, of the Western Circuit, has been appointed Recorder of Southmolton. Mr Yonge, of the Western Circuit, has been appointed Recorder of Barnstaple and Bideford. The Chancellor of the Duchy of Lancaster has appointed Thomas Wheeler, Esq., LL.D., of the Northern Circuit, to the judgeship of the Salford Hundred Court, vacated by the promotion of Mr Stamford Raffles to a stipendiary magistrateship at Liverpool.

**COURT OF SESSION.**—A return of the causes instituted and decided in the Court of Session from the 1st of January 1859 to the 1st of January 1860, stating the number of causes ready for judgment but not disposed of, shows that the number of cases enrolled during the year before the Lords Ordinary has been 1282; the number of decrees in absence, 276; number of final judgments in litigated causes, 524; number of causes ready for debate, but not heard, 83; of which the earliest enrolled was entered on the 14th of June 1859. In the First Division of the Inner House, 213 reclaiming notes against judgments of Lords Ordinary have been presented in the course of the year; and 584 applications have been presented, of which 479 passed as matter of form, and 105 were followed by litigation. 221 final judgments were pronounced without the intervention of a jury, and 17 causes were tried by jury. The number of causes ready for judgment on hearing counsel or otherwise is 118. This is exclusive of causes at *avizandum*. In the Second Division, 95 reclaiming notes have been presented during the year; and 455 applications, of which 409 have passed as matter of form, and 46 have been followed by litigation. 155 judgments have been pronounced without intervention of a jury, and 8 have been tried by jury. 29 causes are ready for judgment on hearing counsel or otherwise. This is exclusive of causes at *avizandum*.

**SCOTTISH UNIVERSITIES AND THE MIDDLE TEMPLE.**—The Society of the Middle Temple, on the motion of James Anderson, Esq., Q.C., has resolved that members of the Scottish Universities shall in future be admitted members of that

Inn without making a deposit of L.100 on admission; and that members of the Inn who shall, at the same time, be members of any of the Scottish Universities, shall be entitled to keep a term by dining in the hall any three days. From a communication which the Senatus Academicus of the University of Edinburgh have received from the learned gentleman with whom this motion originated, it appears that the term "Members of the Scottish Universities" includes not only graduates and members of the General Councils, but all matriculated students. It will, however, be necessary that a student availing himself of the University privilege, which exempts him from paying a deposit, and enables him to keep his term in three instead of six days, shall, before being called to the bar, produce evidence that besides having matriculated he has kept two terms at a University.

**PROCURATORS-FISCAL (SCOTLAND).**—In compliance with an order of the House of Commons (obtained on the motion of Mr Crum Ewing), the copy of a Treasury minute of 1851, under which certain of the Procurators-Fiscal in Scotland were placed on salary, has again be issued. It is stated, that since the date of the minute salaries had also been awarded to the following Procurators-Fiscal, —namely, Dunse (Berwickshire), L.400, from 1st October 1850; Campbellton (Argyllshire), L.430, from 1st April 1859; Greenock (Renfrewshire), L.590, from 1st April 1859. In consequence of the transference of the criminal business of the city of Glasgow to the Sheriff Court of Lanarkshire in 1855, the salary of L.1500, payable under the minute to the Procurators-Fiscal at Glasgow, was increased to L.1925 per annum, from and after 30th September 1855.

**JUDICIAL RUMOUR.**—It is currently reported in legal circles that the senior puisne judge of the Court of Queen's Bench, Mr Justice Wightman, is likely to retire at no distant day. The learned judge has occupied a seat on the judicial bench longer than any of his colleagues, being the last judge now remaining in Westminster Hall who owes his elevation to the Melbourne Government. He was appointed in 1841; and if he do retire now, has therefore well earned his pension, by nineteen years of earnest and indefatigable public service.

**THE BALLOT IN THE PRESENT HOUSE OF COMMONS.**—From a valuable pamphlet entitled "The State of Parties: being an Analysis of the Present Parliament," it appears that as against 319 Conservatives the Government cannot reckon on more than 323 supporters. A list of the friends of the ballot is also given, from which it appears that, after making two or three additions of members, on whose opinions the compiler of the pamphlet was not informed, it appears there are 219 members of the House of Commons pledged to the ballot, of whom two—Sir Henry Stracy and Mr Alderman Copeland—are Conservatives, the remaining 217 being Liberals. It is clear, therefore, that there is a majority of 106 of the Ministerial supporters in favour of the ballot. The combination of a small body of earnest ballot-men might, in the present crisis, bring the Ministry to concede the ballot.

#### ADDITIONAL SHERIFF FOR DUNDEE.

The following Memorial has been presented to the Lord-President of the Court of Session, the Lord Justice-Clerk, and the Lord Advocate, on whose recommendation the Treasury are entitled to add to the judicial staff in the Sheriff Courts:—

The MEMORIAL of the Procurators practising in the Dundee District of the County of Forfar,

*Humbly sheweth*,—That having reference to the 37th section of the Sheriff Court Act (1853), the Memorialists beg respectfully to bring under your Lordships' notice the state of the Sheriff Court business at Dundee, rendering it necessary, in the opinion of your Memorialists, that an additional Sheriff-Substitute should be immediately appointed.

1st. In 1832, when a Sheriff-Substitute was appointed at Dundee, the popula-



tion was about 45,000. The first Substitute was Andrew Gillies, Esq., Advocate, who held the office for less than two years, and he was succeeded by the present Substitute, John Irving Henderson, Esq., Advocate. At present the population of Dundee is fully 95,000, and there are attached to Dundee several adjacent parishes, having an additional population of at least 30,000. The trade, manufactures, and shipping interests of the district have also increased in a greater proportion than that of the population.

2d. There has always been a very large amount of civil and criminal business to be performed at Dundee, and this business has been increased by the provisions of the Sheriff Court Act of 1853. That Act, besides appointing oral debates, laid on Sheriffs the duty of personally taking proofs; moreover, year after year the Legislature has devolved new duties upon, and extended the jurisdiction of Sheriffs, whereby a very considerable additional amount of labour is thrown on Sheriff-Substitutes.

3d. The system of conducting the business of the Sheriff Court at Dundee has never been placed on a satisfactory footing; it has been for years a source of constant irritation and complaint by the bar and by the public. The Memorialists attribute this to the fact that no proper consideration has ever been given to the public requirements of the district; and the consequence has been continual delay, and, in some degree, a stoppage in the administration of justice in one of the largest and most populous districts of Scotland.

The Memorialists caused authentic returns to be prepared by the Sheriff-Clerk, of the business of the district, civil and criminal.

[The Memorial then enters on a detailed statement, showing the enormous accumulation of business, civil and criminal, in the Court at Dundee, and proceeds:—]

On the foregoing state of the facts, the Memorialists would humbly observe:—

1st. If the time necessary for holding the usual courts, and business connected therewith, be taken at three days in the week—that is to say, one for the Small-Debt Court, one for the Ordinary Court, and one for the criminal cases and debate roll taken together—there are only three days in the week otherwise to account for. Then, looking to the extent of the criminal and general incidental business, two days would be consumed in disposing of it, while the Judge would require at least one day for considering and advising his cases. His time would, therefore, be more than fully occupied, even were it possible to calculate the working of the business in this way. But that is impracticable. In working such a business, the actual time day by day requisite must not merely be calculated—the difficulty is that the business comes *simultaneously*, and would require more than one individual to carry it on. One Judge cannot be taking a criminal declaration and at the same time sitting in his Courts; but such business has to be done simultaneously, and the practice accordingly has been that, to a large extent, criminal declarations are taken by a non-professional Justice of the Peace.

Then, without reference to circuit, and other county duties, what is to come of the proofs? The proofs allowed last year were 187, including services; but say 100 in ordinary cases. Notwithstanding the great assistance given by the Sheriff during the year, it has been found impossible to have this department of business at all kept up, or to have what is done executed in that deliberate manner which justice requires. It is impossible to tell the length of time necessary for taking proofs: some may be short, and others very tedious; but there would nearly be a proof for every day—four days a week—of the session; and thus one Sheriff-Substitute cannot, with the other duties above-mentioned, take any. For these proofs must go on simultaneously with the other duties; and as an instance of the time sometimes occupied in taking them, the Memorialists may refer to two at present going on in the county:—one at Forfar, which has already occupied the Sheriff-Substitute for eight days, and no appearance of an end of it; and one at Dundee (taken by Mr Duncan M'Lachlan, a Procurator of Court, who acts as an honorary Sheriff-Substitute, and who has given a great

deal of time and attention gratuitously in assisting the Sheriffs), which has occupied five days, and the pursuer's evidence not yet closed.

These details are exclusively applicable to the business transacted in Dundee, and show that it is utterly impracticable to carry it on with one local Sheriff; nor would any additional occasional assistance from the Sheriff-Principal remedy the evil. What is required is the simultaneous and continued attention of two Judges, who, by a fair division of labour, would systematically carry on the public business in all its branches. The criminal business alone is very large; and if the Memorialists may be allowed one comparison, they would refer to the case of Edinburgh, where, even although the great bulk of the business is brought directly before the Supreme Court, there are four resident Sheriffs—a Principal and three Substitutes.

The Act of 1853 contemplated the appointment of additional Sheriff-Substitutes, in consequence of the additional duties laid by it on such officials; and as the duty of determining the necessity for such appointments is laid on your Lordships, the Memorialists humbly submit that they have shown that the due administration of justice and the public service imperatively require that an additional Sheriff-Substitute be appointed at Dundee.

The Memorialists crave an interview with your Lordships, when full particulars and further explanations may be given.

Signed by the Committee appointed at a General Meeting of Procurators, and also by the Chairman of said Meeting.

GEO. MILNE, *Chairman*.

(Signed)

THOS. THORNTON, *Convener*.

WILLIAM HAY.

PETER REID.

ARCHD. PAUL.

WM. SCOTT, jun.

DUNDEE, 11th February 1860.

## New Books.

*Erskine's Principles of the Law of Scotland.* A New Edition adapted to the present state of the Law. By JOHN GUTHRIE SMITH, Esq., Advocate. Edinburgh: Bell and Bradfute.

AMONG the numerous elementary treatises on municipal law, *Erskine's Principles* is probably the best that has been written in modern times, if not also the most popular. Contrasted with its great English rival, *Blackstone's Commentaries*, this work cannot indeed be said to have attained a high position as a work of authority; the reason being, as every lawyer is aware, that it is generally regarded as an abridgment of his large and more highly elaborated work. *Erskine's Principles* was from the first intended to serve as an introduction to the study of Scotch law. Blackstone took a somewhat higher ground, claiming to come forward as a guide to the non-professional magistracy, and that large class to whom a certain amount of solid and precise information on legal subjects is indispensable. Viewed simply as an elementary treatise, we confess to a decided preference for the epitome of our native jurist.

Erskine seems to have possessed in an eminent degree an art which few legal authors have thought it worth while to cultivate,—

“The last, the greatest art—the art to blot;”

and it is his greatest triumph that he succeeded in presenting, within the compass of a small octavo, a scheme of municipal law, which, for breadth of view, unity of tone, and simplicity of structure, has no equal in the literature of the profession. Accordingly, while Blackstone continues to be cited in Westminster Hall, and, along with Burn's Justice and the Current Statutes, takes its place in the libraries of country gentlemen, *Erskine's Principles* has penetrated into circles, in which our English neighbours would be disposed to think the doctrines of the law as entirely out of place as the study of agriculture would be in the chambers of a London attorney. We do not pretend to say how far Mr Erskine may have been answerable for the development of that litigious spirit which is said to be characteristic of our countrymen. Probably it would be more safe to hold that his work was adapted to the national taste for the formal sciences. Certain it is that the book at once established itself as a popular favourite, and went through several editions in the lifetime of the author. Although very defective as a manual of the existing law, this popularity has continued unabated; and even in libraries consisting, it may be, of a dozen volumes in dingy calf, the curious in such matters may not unfrequently discover an antique edition of Erskine holding his head erect amongst the grim theologians and other sages of a past generation.

That, however, would be a very imperfect estimate of the value of *Erskine's Principles*, which regarded it solely in the light of a popular manual. Beyond all other works, it is invaluable to the Scotch lawyer, because in it alone he is presented with an intelligible view of the *theory of Scotch law* within an area not exceeding the bounds of ordinary mental vision. To attempt to master the principles of our law through the medium of any of our folio institutional treatises, would, we fear, be to most minds a hopeless task. *Bell's Principles* is too condensed, and runs too much into detail, to be available for theoretical purposes; it is a book for study or reference, rather than for continuous perusal. And so it is, that with all its accumulated imperfections, *Erskine's Principles* remains, and will remain, the only work which can be put into the hands of a student at the outset of his professional education.

For the first time after the lapse of a century, an attempt has been made to supply what was wanting to the utility of this work as an elementary manual. The work of the restorer is at all times a responsible—too often a thankless task. Entertaining the high opinion we have expressed of the value of the original, we have looked with a commensurate degree of anxiety to the construction of the amended edifice. We shall enounce in a single sentence the conditions (easy and simple as they are) of a perfect restoration;

and we believe our readers will have little difficulty in satisfying themselves that Mr Smith's edition is considerably in advance of our modest standard of excellence. A brilliant writer and great authority in matters æsthetic has imprecated the vengeance of posterity upon that impudent charlatanry, which displays itself in *obliterating* the remains of ancient art under the pretence of restoring them. Mr Ruskin accordingly lays down this inflexible canon of criticism, that all restoration must be in the way of addition,—not a stone or a tint of the original design must be desecrated by the tool of the restorer. As for those who think they can improve, let them try their hands if they will on a new structure; they have no right to mutilate the great designs of a former age. This sound principle is equally applicable to literary compositions as to works of art. The only difference is, that the corrupters of the text of our classical authors do not deserve to be, like the dull destroyers of our churches and public buildings, “damned to everlasting fame;” but are sufficiently punished when the public refuse to buy their books, preferring the ancient and authentic editions.

Mr Smith, who has already given proof of his ability as an original writer, deserves some credit for resisting, in his new undertaking, the temptation to tamper with the integrity of the text, and for preserving intact the order of arrangement of the original work. The main divisions of municipal law are, as every lawyer knows, marked out by well-known landmarks; and it is perhaps of little moment, in what order these divisions are presented. Still the arrangement of the subject is part of the author's design, and it is at least insulting, if not injurious, to meddle with it.

What Mr Smith has actually done is easily explained. He has inserted, generally at the end of the chapter, such additional matter as is required to complete the author's design. When it is remembered that the plan of the *Principles* partakes of the historical method of treatment, it will at once be seen how easily this intercalation of new matter can be effected without breaking in upon the continuity of the subject. Even where the expositions of Erskine are entirely inapplicable to the existing law (as in the chapter on Heritable Securities), the editor does not obtrude himself, as some commentators will persist in doing, in notes and insufferable parenthetical clauses; but boldly divides the chapter into two, merely prefixing the title, “Ancient Forms,” to apprise the student that this portion of the text has become antiquated. We confess, however, to have read with some alarm an announcement in the preface, that portions of the original text have been thrown aside “in places where it was entirely obsolete, and had ceased to have even a historical interest.” On a cursory comparison with the original, we have not been able to discover many traces of the excising knife; and are in hopes that this dangerous remedy has been used only to a nominal extent. We do, however, most strongly advise the editor, as soon as a reprint of his edition is called for—and we do not think he will have long to

wait—to restore whatever has been suppressed, putting it, if he will, within brackets, or at the foot of the page. While on this subject, we may observe that the First and Third Books of Erskine have been divided, so that there are now six principal divisions instead of four; and a number of the original chapters have also been subdivided. These minor alterations have been rendered necessary by the gradual extension of the field of our municipal law; and as they do not affect either the language or the consecutive distribution of the text, they are judicious and unobjectionable. The leading divisions are therefore as follows:—(1.) Public Law; (2.) Personal and Domestic Relations; (3.) Real Property; (4.) Personal Property; (5.) Succession; (6.) Process and Crimes.

Hitherto we have treated of that portion of Mr Smith's labours for which good taste and judgment are the only requisites. But our criticism would be incomplete were we not to add, that while the editor has not sacrificed his author to the love of personal display, the additions he has made to the text are at once ample and meritorious. The new matter embraces every material innovation in the principles and practice of the law, and is conceived in the like philosophical spirit, and expressed in the same simple and popular style, which have made *Erskine's Principles* the most popular of our legal classics. A copious citation of authorities gives it an additional value as a manual of reference. Those who are in search of minute and curious information on special topics, will not of course expect to find it in an octavo treatise; but to the student, and to the educated and intelligent amongst all classes to whom a knowledge of the laws of their country is indispensable, we cordially recommend it.

In point of typography and getting up, the work is creditable to the taste of the publishers. The references to authorities are placed at the foot of the page, where they are not in the way of the reader; and the text is distinguished from the editorial additions in a way that is not disagreeably obtrusive to the eye.

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## Correspondence.

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### COURT OF SESSION AND MODE OF APPEAL.

*To the Editor of the Journal of Jurisprudence.*

In several recent numbers of the *Journal*, certain important changes in the constitution of, and form of procedure in, the Court of Session have been ably advocated. It might be insinuated that such projects are of a selfish and sinister character, calculated to enhance the Supreme Court and the system of centralization, to the prejudice of local and provincial Courts. Such alarm is unfounded; and to the mind of any person who has attentively studied the subject, such reforms will have the tendency to consolidate the judicial tribunals of the land, and to engender respect to the laws more deep and extended.

Wherever there is a fault in the administration of law, that fault affects the whole system, and tends to bring it into contempt. If there be unnecessary expense, complexity, and delay in any one department, the complaint is extended to the whole.—“*The Law's delay*,” “*Its glorious uncertainty*,” and “*Its enormous cost*,” become household words—the proverbs of a people. The law itself is hated, and its courts shunned, because in some one of its varied spheres its operations are clumsy, costly, and the reverse of certain.

The beauty of any system of administrative justice is ready access to courts at hand, bringing justice to the door. But there must exist wise checks against miscarriage of justice. Speed will be dearly purchased at the expense of error. Economy of justice is a miserable compensation for economy in cost. Injustice, however cheap, is an evil which gnaws the very vitals of the commonwealth.

The check on local courts is a ready and cheap mode of appeal to a supreme court, removed both in distance and in dignity from the suspicion of local influences or prejudices.

One of the primary benefits of such ready access to a court of appeal is, a sense of responsibility uniformly impressed on the mind of the local judge. Destroy this, and straightway the *sic volo sic jubeo* becomes the rule of action. An irresponsible judge is a judicial tyrant, capable of doing much evil under the garb of justice.

But next to irresponsibility by the existence of an injudicious finality is the mockery of an appeal so cumbrous, expensive, and dilatory, as to confine the privilege to the limited few, whose wealth enables them to indulge in the luxuries of law. An unprincipled judge might calculate where his judgment would probably be submitted to review, and where it was not at all likely to be so reviewed, and act accordingly.

There are some great mistakes committed in judging of the effects of a ready appeal. It has been argued, that if the door of review be opened too wide, there will be an undue temptation to carry up cases which otherwise would have rested in the first Court. With submission, the tendency is in the opposite direction. There is not an agent in the profession, either metropolitan or provincial, but who can bear testimony that a multitude of judgments of local judges are advocated when there exists no hope of an alteration, but where the certainty of two, if not three years' delay, and the prospect of enormous expense in supporting the judgment, will induce a compromise at a very great sacrifice. Parties are in this way often compelled to an unsatisfactory arbitration of legal questions, often to unprofessional referees. The high number of appeals is therefore no index of the unhealthy working of inferior judicatories; but may in fact only establish the unsuitableness of the supervision to which they are subjected. Neither is a high number of reversals in the Supreme Court any criterion of the unsatisfactory state of local courts. It has been hinted that there may be a tendency in a court of review to encourage appeals; but the fact of a preponderance of reversals may be better accounted for by the fact, that it is only cases of nicety or doubt which are carried to higher courts, leaving the great mass of mere common-day causes to remain on their primitive decision. The more mature investigation cases receive from new minds often result in a decision on grounds not formerly raised.

But an expeditious mode of appeal would prevent cases being carried up for the mere sake of delay, because the despatch they received would effectually prevent unnecessary recourse to such expedient by making it too dear. On the other hand, cases of difficulty would probably receive the greater amount of attention from the first judge, and where appealed might speedily be adjudged on by the Appeal Court; and thus consistency and uniformity of law would be secured throughout the kingdom. It is to be feared that at present, even in questions of much importance in rural affairs, what is held as law and practice in one county is the very opposite in another, perhaps the next adjacent.

There is a striking contrast between the law and practice of England and Scotland as to the right of appeal, and the speed of decision. In the former,

an appeal on all points of law can readily be had from the Justices, both in special and quarter sessions, and from County Courts, to the Supreme Courts of law. It is not unusual to find the judges of the Supreme Courts in full bench delivering lengthy and well-digested opinions, whether a toll of a few pence is exigible on certain articles, or whether some small claim falls under the Statute of Limitations. In Scotland, no such questions can ever reach the Supreme Court except by declarator, and thus the Law of Tolls in Scotland is as diverse as there are counties or districts; and, indeed, the "*Law of the Road*" in some counties varies periodically with the occupants of the bench for the time being.—I am, etc.,

A COUNTY COURT JUDGE.

### MARRIAGE WITH A DECEASED WIFE'S SISTER.

SIR,—I am induced to address you on this subject, by the letter in your publication for this month, from "One who is interested."

I regret that I cannot furnish your correspondent with what he is in search of; but there are some reflections which have occurred to me on this subject, a statement of which may not be uninteresting to any one who is interested.

Looking to the terms of the Confession of Faith, which is ratified by Act of Parliament, and which declares, that "the man may not marry any of his wife's kindred nearer in blood than he may of his own, nor the woman any of her husband's kindred nearer in blood than of her own;" looking also to the different opinions entertained by many whose opinions are entitled to the greatest respect, and to the position taken by the Court in the recent noted case of *Fenton v. Livingston*, I do not propose to enter into a discussion as to what is the law of Scotland on this vexed question, but rather to throw out some hints as to the true construction of the Mosaic law, that law upon which the law of Scotland as to the forbidden degree is admittedly founded.

Now, I am disposed to maintain, that the clause in the 18th chapter of Leviticus was not intended to operate either as a prohibition against marriage with a deceased wife's sister, or against bigamy, or polygamy; and this, I think, may be proved from other parts of Scripture.

Let us first inquire whether a plurality of wives was prohibited under the Mosaic law:—And as showing that it was not, I would refer to the book of Deuteronomy, chap. xxi., v. 15 *et seq.*; from which passage it is evident that, under the Mosaic dispensation, it was quite permissible to have "two wives." By turning to the passage referred to, it will be noticed, that no question is raised as to which of the two wives was the first married. The mother of the *firstborn son* might not have been the first married wife, nor the mother of the firstborn child; but, notwithstanding, her son was to have the position and the rights of the legitimate firstborn son. I would also refer to the practice amongst those who lived under the Mosaic dispensation; and perhaps it may be sufficient to refer specially to the case of the prophet David—the divinely-elected founder of the Hebrew dynasty. Even his marriage with Bathsheba must be considered legitimate in a legal sense, because from it descended not only the royal house of Judah, but also the Messiah (see Matthew, chap. i.), who is uniformly regarded by the prophets as the pure, lineal, and legitimate descendant of the second King of Israel. It may also be noticed, incidentally, that in the prophet Nathan's rebuke to David, recorded in the 12th chapter of 2d Samuel, the Lord is said, v. 8, to have given David "wives."

Such may be sufficient to show that a plurality of wives was not prohibited by the Mosaic law.

Let us now inquire, whether marriage with a deceased wife's sister is prohibited by the text in Leviticus before referred to.

I will take it for granted, as mentioned by Professor More in his Notes on

Stair (note B, v. Forbidden Degrees), that it is an acknowledged rule of construction that a prohibition against a certain degree of consanguinity or affinity applies equally to either sex, and that all authorities legal and philological are agreed in this. On this rule of construction, intermarriage between a man and his deceased wife's sister is precisely similar to intermarriage between a woman and her deceased husband's brother; and if the one be prohibited so would be the other. Now, that the latter mode of intermarriage was not intended to be prohibited by the Levitical canon is, I think, a necessary inference from other parts of Scripture. Indeed, in certain circumstances, viz., where a woman had no children by her first marriage, she was not only allowed, but *positively enjoined* by the Mosaic law, to intermarry with her brother-in-law. See Deuteronomy, chap. xxv., v. 5 *et seq.*, and Genesis, chap. xxxviii., v. 8, 9, 10.

On the rule of construction just referred to, it necessarily appears that the 18th verse of the 18th chapter of Leviticus was not intended to prohibit intermarriage with a deceased wife's sister.

If it be asked, what then does that verse mean, and what does it prohibit? I would answer—what it literally expresses, viz., that, in a state and society where a plurality of wives was allowed, a man should not have two sisters for wives at one and the same time. And if we look at the expressions used in that verse, and consider the domestic jealousies and vexations in the family of the patriarch Jacob, arising out of his having had two sisters for wives at the same time, we at once see the value and the force of that prohibition, as so understood.

These are the views I take of the Mosaic law on this question; and if we are told that the Mosaic law is not applicable to the present state of the world or of society, let it be remembered that it is upon the Mosaic law that the *prohibition* is founded which is supposed to bring marriage with a sister-in-law within the category of the forbidden degrees. If the foundation of this prohibition is *inapplicable*, what becomes of the prohibition?

I have often been astonished, that those who have entered into a discussion as to what ought to be the law on this subject have not drawn a distinction between the cases where there are no children, and where there are children of the first marriage. Where there are no children, the bond of union that subsisted between the surviving husband and the relatives of the lady is dissolved by death, and there is, morally speaking, no more relationship between the parties than there was originally; and I can see no reason why, in such a case, intermarriage should be prohibited.

Where there are children, however, the case appears to me to be different. I certainly cannot point to any passage of Scripture clearly prohibiting intermarriage with a deceased spouse's brother or sister in such a case. Leviticus; chap. xviii., v. 16, and chap. xx., v. 21, *may* be held to apply; but probably these passages apply literally to a brother's wife and not to a brother's widow.

Yet I must say that my own views and feelings are with those who maintain that the relationship subsisting between uncle or aunt, on the one hand, and nephews and nieces, on the other, ought not to be changed; and that one having the blood relationship of uncle or aunt ought not to be brought into the position of parent by marriage. A man may not marry his aunt, and does it accord with our better feelings that the man's father may marry that aunt?

These reflections may serve as hints for the further elucidation of this *vexata questio*.—I am, &c.,

ITA EST.

EDINBURGH, 21st February 1860.



## Digest of Decisions.

### COURT OF SESSION.

#### FIRST DIVISION.

EARL OF WEMYSS *v.* GRAHAM.

*Bill of Exchange—Reference to Oath—Turpis Causa.*

In a M.P. brought for the distribution of some funds belonging to the late Mr Graham, James Mackinlay claimed on a bill for L.900, bearing to be granted by the deceased. The question of value having been referred to his oath by the other claimants, he deponed that he had married a daughter of the deceased; that he had divorced her for adultery; and that, on a promise from his father-in-law that he would give him L.3000, he consented to take her back to live with him, and did take her back. Some years after, the bill in question was granted, and was intended, he said, to be in fulfilment of the aforesaid promise, and to reimburse him for the expense he had been put to in obtaining the divorce. The Court held the oath negative of the reference, because (1.) supposing there had been an agreement to pay the L.3000, or the expense of the divorce suit, it was extrinsic; (2.) it was *turpis causa*.

WILSON *v.* BARTHOLOMEW AND CO.

*Suspension—Competency—Decree ad factum præstandum.*

This was a suspension of a charge on an extract interim decree, requiring the complainer to pump out the water in a coal-pit at Dalmarnock, so as to keep it down to a certain level. The competency of the suspension was objected to, inasmuch as it did not fall within sec. 24 of 16 and 17 Vict., cap. 80. The Lord Ordinary thought that the complainer had mistaken his remedy. He should have brought a note of suspension with a statement of facts and pleas in law, so as to enable the Lord Ordinary on the Bills to judge whether the note should be passed or not. Instead of that, he had presented a mere formal note without reasons, to be passed, of course, under 1 and 2 Vict., cap. 86. He therefore dismissed the process, and the Court adhered.

MACKINTOSH *v.* FRASER.—*Jan. 20.*

*Jury Trial—Wrongous Detention in Lunatic Asylum—Powers of Counsel.*

This was an action of damages for the wrongful apprehension and detention of the pursuer in a lunatic asylum. The jury found for the defenders, because in their opinion the pursuer was insane at the time referred to, and had been properly confined. A new trial was now moved for on the ground, (1.) that the verdict was contrary to evidence, the eccentricities deponed to being traceable to drink only; and (2.) by reason of certain matters disclosed in an affidavit. The pursuer deponed that he specially instructed the Solicitor-General, who was leading counsel for him at the trial, to examine him as a witness, and that he insisted upon this as absolutely essential in support of his case; there were many circumstances, in regard to which he alone could give an explanation to the jury, and he remained under the impression and belief, down to the

close of the case, that he was to be examined as a witness; he was in attendance for the purpose, and, accordingly, was desired to remain out of Court, and he did remain out of Court during the whole time when the evidence on his behalf was being led; when his case was about to be closed, he was engaged in looking over certain memoranda which he had for the purpose of assisting his memory in giving evidence, and came into Court in order to be examined; but when he arrived, he found, to his astonishment, that the Solicitor-General had declared the pursuer's case closed, and the Solicitor-General informed him that he had resolved not to examine him. This was contrary to the foresaid special instructions given to the Solicitor-General, and contrary to the understanding upon which he was authorized to act as counsel for the deponent. After the defenders closed their evidence without examining the deponent, he determined to make another attempt to put his evidence before the jury; and, accordingly, at the close of the judge's charge, he rose to state to the judge the manner in which he had been treated by the exclusion of his evidence, as above set forth, and to request the judge then to have him examined as a witness. But before he made his statement, he was interrupted by the presiding judge, and he was not allowed to make the statement and request which he intended to do. It was argued on the authority of the English case of *Swinfen v. Swinfen* (31 L. T. Rep. and 18 Scott), that a counsel had no power to violate the special instructions on which he was employed. The Court was clear that the first ground on which the motion was rested was unfounded, because no other verdict could have been returned. On the second, the case was distinguishable from *Swinfen's*, where the counsel did not err in conducting the case, but went out of their province to put an end to it by compromise. Here the alleged error was in the conduct of the cause. The pursuer was represented by other counsel, and he had an ample opportunity of addressing the Court on the subject before the whole case had been left to the jury. Motion therefore refused.

*Pet., ERSKINE WEMYSS.—Jan. 24.*

*Process—Petitions—Falling Asleep.*

The Lord President in this case intimated that, after consultation with the other judges, the Court was of opinion that a petition in dependence before the Junior Lord Ordinary does not fall asleep.

*CLYDESDALE BANK v. THE LORD ADVOCATE.—Jan. 27.*

*Banking Company—License—Statute—Construction.*

The Act 8 and 9 Vict., cap. 38, provides that thereafter every bank shall take out a separate and distinct license for every town and place in which they do business, the rights of the existing branches of banks then in operation being saved. The question in this case was, whether the Clydesdale Bank was, after its union with the Edinburgh and Glasgow Bank, entitled to issue notes at the places where the latter bank carried on business without taking out new licenses,—in other words, whether the licenses of the Edinburgh and Glasgow Bank to issue notes were by the union transferred to the Clydesdale. Lord Ordinary Ardmillan held that they were not transferred, and the Court adhered.

LINDSAY v. LONDON AND N.-W. RAILWAY.—*Jan. 27.**Arrestment jur. fund. causa—Jurisdiction.*

This is an action of declarator, that the defenders are bound to convey the pursuer's fruit, etc., from Liverpool on the usual terms as common carriers, and of damages for their refusal to do so. Jurisdiction was founded by lodging arrestments in the hands of the Caledonian Railway, which, it appeared from a proof, had attached (1) stock of the company standing in the names of Messrs Creed and Glyn, two of the directors of the London and North-Western, for behoof of the company; (2) railway carriages and trucks; (3) balance of profits due from the clearing house. The question was, whether attachment of these subjects founded jurisdiction. The Court held it did. The Lord President remarked—The defenders' argument is, that the stock of the Caledonian Railway Company was not in a position that it could be arrested, as the property of the London and North-Western Railway Company, because no railway company could hold Caledonian Railway stock; and the stock alleged to belong to the defenders actually stood in the name of Messrs Creed and Glyn, the secretary and treasurer of the London and North-Western Company. In the books of the two railway companies there was no trace of the possession of this stock by Creed and Glyn, nor do Creed and Glyn themselves keep any accounts in regard to it. The name in the books of the Caledonian Railway Company is that of the defenders; and from the books and parole evidence, it clearly appeared that, to obviate a difficulty, Creed and Glyn held this stock for the defenders as a *hand*, and as nothing else than a hand. Creed and Glyn were entirely under the orders of the defenders in reference to the management of this stock; and, on this view of the facts, he was of opinion that there was in the defenders a substantial interest in this stock, which was attachable by arrestment. As to the last matter, of the balances of joint traffic, it is denied that they had any existence, and that in regard to them it is not yet determined in whose favour the balance is. If that is so, then the defenders have a substantial interest in this uncertain balance, which is arrestable. That arrestment of a substantial interest was sufficient to found jurisdiction, had been held in the case of Douglas, 18th June 1831. He quite well recollected that case, and the report was erroneous, because it led to the inference, that the Court recognised the value of the thing arrested as the measure of the decree. The Court did not do that, and no Scotch lawyer would do so. When the jurisdiction is once established, and the party has appeared, the thing arrested may go away, and its value is immaterial. As to the carriages, the facts are very obscure; and he did not think it necessary to give any opinion as to whether the *nexus* had been laid on them or not. Lord Ivory concurred at length. If it were to be sustained that the standing of the shares in the name of Creed and Glyn were to defeat the arrestments, then all that any man in Scotland would have to do, if he wished to defeat the diligence of his creditors, would be to name a trustee on the other side of the border, and then all his Scotch creditors could be whistled down the wind. On the subject of arrestment in order to found jurisdiction, many remarks in many places had been made in ignorance, and from overlooking the distinction between process in presence and process in absence. If a party whose property had been arrested did not choose to appear, and

decree was obtained against him, the party who had obtained decree could make the most of the article arrested; but if appearance was made, and decree obtained, it was good to the last shilling, whatever the value of the article arrested. Lords Curriehill and Deas concurred; the latter remarking, that if a substantial interest be arrested, it did not signify though nothing were eventually recovered; that he did not say what would be the effect of the defenders disclaiming all interest in the thing arrested, but the defenders here had *not* disclaimed all interest in the matters arrested.

**FAIRLIE'S TRUSTEES v. FAIRLIE.—Jan. 31.**

*Entail—Trust for Creditors—Construction.*

In 1823 the late Sir William Cuninghame Fairlie, Bart., executed a disposition and conveyance in trust to the pursuer, Mr Rothwell, and the now deceased Robert Burnett, writer to the signet. This deed proceeded on the following narrative:—In the introductory or inductive clause of the trust-disposition, Sir William declares, "I am desirous to do everything in my power for the interest of my creditors, and the liquidation of the claims against me." He therefore (1.) disposes generally to the trustees "all and sundry lands and heritages, teinds, rights of patronage, lands that may descend to me under entail, under the restrictions and conditions thereof, so far as incumbent on me," empowering his trustees "generally to do everything thereanent which I could have done before granting hereof." He provided that his trustees should be as unfettered in respect to the entailed property disposed to them as he was himself. He then specially disposes the lands and barony of Fairlie, with "all right, title, or interest I have to or in the same;" the only qualification or restriction being "that the right of my said trustees shall be and is hereby restricted to my own right and interest in the lands and others above disposed, my trustees being hereby obliged to comply with the whole conditions and stipulations contained in the investitures thereof, in so far as incumbent on me." The truster further provided as follows:—"It is hereby further provided and declared, that the whole debts and sums of money, principal, and annualrents, due by me at and preceding the date hereof, and penalties to the extent of the expenses already incurred, are and shall be real burdens upon the subjects hereby conveyed, and shall be preferable to any future debts to be contracted and deeds to be granted by me and my heirs." (2.) Power was conferred upon the trustees, upon attaining the granter's consent, to sell the granter's liferent or other interest, real or personal, in the said lands, and also to borrow money upon heritable security; to superintend and manage the lands and coal situated therein, and the estate vested in them, in such way as should appear to them most advantageous; and to grant leases. Sir William died in 1837. In 1856 Sir C. C. Fairlie, the heir then in possession, raised an action of declarator under the Entail Amendment Act, in which he obtained a decree to the effect that he held the lands in fee simple, in respect that one of the prohibitions in the entail against disposing the lands was not fenced by a proper irritant clause. The trustees under the deed of 1823 now raised a process of mails and duties, in which they maintained that the trust-deed conveyed the truster's right to challenge the entail, and entail having been found to be ineffectual, they were

entitled to enter into possession. The Lord Ordinary (Benholme) pronounced this interlocutor:—"12th November 1858.—The Lord Ordinary having heard parties' procurators, and made avizandum, finds that the deceased Sir William Cuninghame Fairlie held the estate of Fairlie by virtue of an entail, which contained a valid prohibition against contracting debt, duly fenced by irritant and resolute clauses: Finds that, in 1823 and 1824 respectively, the said Sir William Fairlie executed the trust-deed and supplementary trust-deed libelled on, in favour of certain trustees for behoof of his creditors, which form the title of the pursuers of this action: Finds that these deeds, in so far as regards the entailed estate, were limited and restricted by the fetters of the entail, and were calculated to convey, and did convey, such right only to the trustees for behoof of his creditors as Sir William was entitled to convey under the provisions of the entail: Finds that these deeds would have fallen under the restrictions of the entail, as constituting contractions of debt, had they been framed so as to subsist after the death of Sir William, or to attach more than his liferent interest in the entailed estate; but finds, *separatim*, that they were not so framed, but that, in so far as the entailed estate was concerned, they fell, and became ineffectual at his death: Therefore finds that the pursuers have no good title to pursue the present action; assolizies the defender from the whole conclusions of the action, and decerns; finds the pursuers liable in expenses; allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report." The Court, on a reclaiming note, adhered; holding that what was conveyed, was simply the interest which the truster had in the lands subject to the conditions of the entail. It therefore terminated with his life.

DAWSON v. DAWSON.—Feb. 3.

*Suit Abroad—Interdict.*

An action was raised by an Englishman in the Court of Chancery against Dawson's Trustees (three of whom lived in Scotland and one in England), to obtain relief against a series of frauds perpetrated by Dawson in the affairs of the Carron Company, of which plaintiff was a shareholder. The trustees brought a multiplepounding in which the plaintiff in the English suit claimed; and he also raised a reduction. The Court refused, *hoc statu*, a motion to interdict him from carrying on the proceedings at his instance in the Court of Chancery.

MITCHELL, CADELL, AND CO. v. W. AND J. MILLAR.—Feb. 10.

*Principal and Agent—Foreign Principal—Liability of Agent.*

On 22d February 1854 the defenders, merchants in Leith, on behalf of Cordes and Gronemeyer of Hamburg, sold to the pursuers a cargo of bones, to be shipped from Denmark in March or April. The defenders had the authority of Cordes and Gronemeyer, and at the time of the transaction, the pursuers were made aware that they acted in behalf of that house. The question was, whether, there being a breach of the contract, the defenders were personally liable in damages. Held by the whole Court (*diss.* Lords Deas and Neaves), that as to the liability of an agent in such circumstances, there was no rule of law in the matter. The question was simply, Whose faith was followed—the agents' or the

principals' ? and that was a question for the jury. Where the principal was a foreigner, there might be a presumption in favour of the liability of the agent of a stronger kind than when he is not ; but it was a presumption of fact, not of law, liable to be rebutted by other evidence in the case. Treating this case as a jury question, the Court decided that the agents were not liable.

DAVIDSON v. DAVIDSON.—*Feb. 11.*

*Divorce—Evidence—Virgo Intacta.*

In a suit for divorce at the instance of the wife, the pursuer proposed to examine Professor Simpson, in order to prove that one of the females with whom he was alleged to have committed adultery was *virgo intacta*. Evidence held to be incompetent, chiefly on the ground that the Court had no power to compel the woman to submit herself to the inspection of another medical man, so as to enable the pursuer to meet the evidence tendered.

## SECOND DIVISION.

GREIG *et al.* v. M'CALLUM.—*Jan. 25.*

*Contract—Obligation.*

This was an advocacy from the Sheriff Court of Bute. The pursuers, in August 1856, contracted for the mason-work of three houses for the defender. The specification contained the following clause :—"The whole work, or as much thereof as may be required this season, to be completed within three months of the date of commencement, and to be finished to the entire satisfaction of the proprietor." The houses were begun in September, but not completed till June 1857. The pursuers claimed payment of their account ; and the defender set up a counter claim in compensation for loss arising through the pursuer's failure to perform the work within the stipulated period. The Sheriff-substitute, with whom the Sheriff concurred, had held, that as there was no averment on record of distinct and formal requisition made by the pursuers on the defender to complete the work within the period, there was no ground stated relevant to infer liability for the damages claimed. The Court (Lord Benholme dissenting) altered the interlocutor complained of, in so far as they found the averment of breach of contract not relevant, and allowed a proof as to the counter claim. They held that if the contractors were made aware of the wish of Mr M'Callum to have the work completed within the period, there was an unqualified obligation on them to do so.

WESTERN BANK LIQUIDATORS v. DOUGLAS *et al.*—*Jan. 27.*

*Summons—Dilatory Defence.*

The following is the substance of the judgment of the Court, delivered by the Lord Justice-Clerk, on the plea "that all parties interested had not been called." His Lordship said :—"The parties who the defenders say ought to have been conjoined with them as defenders in this action are eight persons, who are said to have held subordinate offices, during the various portions of the ten years in question, at the head-office of the

bank in Glasgow; thirty-six persons who, in the course of the period, acted as agents of the bank at their local branches; thirteen persons who, during some part of the time, were members of a local board at Edinburgh; and six persons who, in like manner, were members of a local board at Dundee. But this contention was so extravagant and untenable, that it was practically abandoned in the discussion before us, and the plea was reduced to a demand that a certain Mr James Simpson Fleming should be called as a defender. In so far as concerns Mr Fleming's character and actings as law officer (which was explained at the hearing as meaning nothing more than law-agent and solicitor of the bank), and as assistant manager, his case does not differ from those of all the other subordinate officers of the bank, whether at the head-office or branches. But the allegation that he was manager of the bank, from 15th October till the stoppage of the bank on the 9th of November 1857, a period of three weeks, is that on which the defenders placed their chief reliance, at least in the latter stages of the discussion. After referring to the grounds of action, his Lordship proceeded:—The Court are of opinion that this is in both its branches an action to enforce an obligation of reparation, arising *ex delicto*, and not an action on contract; and that the defenders are in the position not of *correi debendi*, but of joint delinquents. In actions of reparation, founded upon delict or *quasi delict*, we hold it to be a settled principle in the law of Scotland, that the defenders are all conjointly and severally liable for the delict or *quasi delict* in which they have been all concerned, and that it is in the option of the pursuer to call all who are so implicated, or any one or more of them.

*Pet.*, WALKER.—*Feb.* 8.

*Poor's-Roll—Qualification.*

This was an application, by a labourer earning 15s. a-week, for the benefit of the poor's-roll, which the Court refused. The Lord Justice-Clerk said—The poor's-roll is not intended for parties who are only in the lower ranks, but for those who, in consequence of their poverty, are not able to afford the expense of litigation. Now, litigation may be regarded as a misfortune or as a luxury. If the latter, it is one of the most expensive luxuries, and it is a luxury which very few people can well afford to indulge in. If every one who could not in that sense afford litigation was admitted to the poor's-roll, there would be very few litigants off the roll. Looking at the present application, we find the circumstances of the applicant, although only a labouring man, unusually favourable for a man in his rank of life. The applicant has not presented a case that entitles him to the benefit of the poor's-roll.

FLEMING v. SIMPSON.—*Feb.* 3.

*Cautionary—Joint and Several.*

In this case the suspender pleaded that he was free from liability under a bond of caution, in respect that he had agreed to become cautioner only on condition that another party should sign along with him, which condition was not fulfilled, the signature of that party being in fact a forgery. Lord Wood (who delivered the judgment of the Court), after stating the facts of the case, held that the cases of *Paterson v. Bonar*, in March 1844, and the *Provincial Assurance Company*, 28th January 1858, on which the judgment of the Lord Ordinary was based, must no

doubt be taken as authorities ; but without trenching upon the principles there laid down, a different result could be arrived at here. The position of a cautioner in a suspension was different from that of the obligants in those cases. The charger's object was to have the suspension refused, with or without caution. Caution was offered by the suspender, and if held sufficient, was in reality forced upon the charger ; and the finding of it was carried through without his interference. It was said that the charger might object to the sufficiency of cautioners. This was true ; and when only one party signed, he would suffer if that signature was not genuine ; but it did not follow that if one signature was forged, he was to lose his recourse against the other cautioners. If satisfied with one subscription, he might rely on it independently of the others. Any injury to the cautioners arose not through the fault of the charger, but that of the suspender ; and their obligation incurred by signing the bond remained unshaken.

SUTHERLAND *v.* MONTROSE SHIPBUILDING CO.—*Feb. 5.*

*Contract—Evidence.*

The defenders contracted with the pursuer to build him a schooner, and to have it launched in January 1857. The price was paid in instalments during the progress of the work ; but the vessel was not launched till the 28th March. The pursuer now brought an action for damages on account of the delay. The Sheriff (reversing the judgment of the Sheriff-substitute) held that the defenders had failed to establish (1) that the delay was sanctioned by the pursuer ; or (2) that the pursuer, on account of having settled the payment of the price, was barred from insisting on his claim for damages. Lord Cowan (with whom their Lordships concurred) held that the Sheriff had decided rightly. By the law of Scotland a written agreement could not be set aside in essential points by parole evidence. Time was an essential element of this contract. The defenders should have got the consent of the pursuer to a prolongation of the time in writing. The second ground of defence raised a question of general importance. The principle contended for by the defenders was, that the acceptance of the vessel when launched barred the pursuer from such an action. The peculiar nature of the contract excluded this plea. The contract was for a special vessel, to be paid for by instalments, which was a different case from that of an ordinary sale of goods. The purchaser, in a case like the present, was entitled to have the subject delivered to him, and to get damages also.

HENDERSON *v.* CULLEN.—*Feb. 8.*

*Suspension—Extract.*

This was a suspension of a charge on a decree for payment of a business account. The decree was pronounced in an action, the summons in which concluded that Henderson and another defender, "as trustees foresaid, and as individuals, ought and should be decerned and ordained, *conjunctly and severally*, or *severally*," to make payment, etc. The suspender pleaded that it was incompetent to pronounce decree against both the defenders, as the summons was executed, called, and enrolled against the suspender alone, and the extract-decree was thus disconform to the warrant. The Lord Justice-Clerk had no doubt as to the question of



form. The summons was against two trustees under a deed in favour of them and the survivor of them. The trust thus subsisting after the death of one of the trustees, and the liability remaining with the survivor, there could be no difficulty in allowing the action under such a summons to proceed against the survivor. The summons did not conclude against the trustees as *jointly* liable, but as liable conjunctly and severally. The decerniture against the *defenders* arose from a mere clerical blunder, the means of correcting which are to be found in the process, the summons having been executed and called against one defender only. It was not only in the power of the extractor, but it was his duty, to correct this error, and he had done so. The objection of informality, therefore, could not stand.

CRICHTON v. ROBB.—Feb. 9.

*Jurisdiction—Domicile.*

The defender was sued in the Sheriff Court of Forfar in an action of filiation by a woman residing in the county of Forfar. The child, though born in Dundee, is alleged to have been begotten in Manchester, where the defender had his residence at the date of the action, and for more than a year previous thereto, although he is alleged to have been born in Scotland. The defender was personally cited to the action when in Dundee, he having been there for a few hours only. Next morning he left Dundee and returned to Manchester, where he has ever since resided. The judgment of the Court on the question of jurisdiction was delivered by the Lord Justice-Clerk:—We must take the facts as they are averred by the pursuer. She avers that the defender was born in Scotland. She does not say that the defender is at present domiciled in Scotland, nor does she deny that he is at present domiciled in England. I take the fact to be that the defender is Scotch by birth, and English by present residence and domicile. Further, the defender has been personally present in Dundee for two days, and was there personally cited. It is perfectly clear that these facts do not create a jurisdiction in the Sheriff of Forfar, and I give no opinion on any point but that. Two grounds of jurisdiction are founded on by the pursuer. First, she says the nativity of the defender, and his personal presence within the territory of the judge, are sufficient to found jurisdiction. Whether that be so or not I give no opinion, because the facts do not raise that question. It is not alleged, much less is it proved, that the defender was born within the territory of the judge. Secondly, it is said there is jurisdiction, because an obligation *ex contractu* arises in the county of Forfar. Now, I don't think that this is an obligation arising *ex contractu*. I do not say it arose *ex delicto*, but it does not arise *ex contractu*, or *ex quasi contractu*. And, besides, I doubt whether there is jurisdiction *ex contractu* in a Sheriff to do anything more than enforce the contract, or some obligation arising out of the contract.

HEPBURN v. HEPBURN.—Feb. 10.

*Succession—General Conveyance.*

This is a question as to the construction of the trust-disposition and settlement of the late Mr Hepburn of Rickarton. Mr Hepburn possessed the estate of Rickarton under an entail alleged to be defective

in some of its clauses. The pursuer, Mrs Hepburn, as trustee under the settlement, and as tutrix for her daughter, the only child of the marriage between her and Mr Hepburn, claims the estate as having been comprehended under the trust-disposition, and carried thereby away from the defender, who is heir under the entail. In the settlement, which was executed in 1857, and subscribed "at Rickarton," the granter designs himself as "of Rickarton;" and after disposing a small property described as bounded by Rickarton, he adds the clause, "as also all other lands and heritable estate of every description which shall belong to me at the time of my death." Mr Hepburn had at the date of the deed only one child, a daughter, who, he knew, would not succeed as heir of entail to Rickarton; but he contemplated and provided for the event of the birth of other children, and directed the division of the estate conveyed to the trustees among these children equally, "exclusive always of any son who may succeed as heir of entail of the estate of Rickarton." The Court, without disposing of the question of the validity of the entail, found that the settlement was not intended to comprehend, and did not comprehend, the estate of Rickarton. Assuming that Mr Hepburn had the power to dispose of the estate, the general words of conveyance might have been sufficient had they stood alone to carry the estate; but such general words were subject to limitation if an intention to limit them could be gathered from the context of the deed. The intention was fairly to be arrived at from the due consideration of the language of the deed. The present case, therefore, resolved into a question of intention; and from the circumstances above stated, it did not appear to have been Mr Hepburn's intention to embrace the estate of Rickarton in the general words of conveyance.

M'RAE v. PAGAN.—Feb. 15.

*Superior and Vassal—Charter—Relief—Teind Duty.*

The pursuer claimed, as alleged titular of the teinds of certain lands belonging to the defenders, a right to draw the teinds of these lands, and sought a judgment declaratory of his right. The lands in question are comprehended in two feu contracts, engaged in by Captain Henderson, the pursuer's predecessor in the lands of Rademir, in the one case, with Robert Mackie, in the other with William Mores.

By the first of these, which is dated 30th November 1748, Captain Henderson conveys to Robert Mackie certain subjects to be held of him in feu for a feu-duty of 100 merks. Amongst other obligations, Captain Henderson binds himself, his heirs, and successors, to free and relieve the said Robert Mackie and his foresaids from payment "of all cess, feu, and teind duties, minister's and schoolmaster's stipend, and all other public burdens whatsoever, which may be due and payable furth of the lands and others above disposed, in all time coming." In an after part of the deed, the stipulated feu-duty is declared to stand in room of "all other burdens, exaction, demand, petition, or secular service whatsoever that may be any way asked or required furth of the said lands, by whatsoever person or persons, in time coming." By the second of the feu contracts, Captain Henderson conveys to William Mores certain other subjects, to be held by him in feu for payment of a feu-duty of 400 merks; and

these subjects "the said Captain William Henderson binds and obliges him, his heirs, and successors, to warrant, acquit, and defend, and to be free, safe, and sure to the said William Mores and his foresaids, not only from all ministers' and schoolmasters' stipends, feu and teind duties, cess, and all other public burdens bygone and in time coming, but also from all incumbrances and burdens whatsoever, at all hands and against all deadly as law will." These feu contracts contain no conveyance, at least no express conveyance, of teinds. The pursuer, Mr Pagan, now comes forward as the successor of Captain Henderson in the lands of Rademir, of which portions were thus granted in feu. He is, therefore, the superior of the defenders (who succeeded to the original feuars) in the subjects contained in the feu contracts. He now maintains a right, as titular, to draw the teinds of these lands.

The defenders contend, on the other hand, that they are protected from this claim by the terms of the clauses above quoted.

The leading question in the case was, What is the true meaning of the obligation of relief which these clauses contain? The defenders maintained that the clauses warrant them against all claims for teind, the superior engaging to relieve the vassal of all such. The pursuer, on the other hand, contended that the only relief agreed to be given is from teind-duties, meaning thereby such duties as may be payable by himself for his right to the teinds, and that his claim as titular to exact the teinds of the lands remains entire.—It was held by the whole Court, that the clause, as construed by the actings of parties, imported an absolute exemption in favour of the vassal.

[Our reports of Outer House cases, and also a portion of the Inner House reports, are unavoidably postponed in consequence of the pressure of other matter.]

## OUTER HOUSE.

*January 28.—LORD KINLOCH.*

*WILSON v. WILSON AND M'ROSTY.*

This is an action of damages for wrongous imprisonment at the instance of a party whose estates before the acts complained of had been sequestered, and who is still undischarged. The trustees having refused to sist the defenders, moved that the pursuer should find caution, citing as a precise precedent the case of Love, 10th February 1835. The pursuer objected to find caution, and contended that the practice had been entirely changed since Love's case; that every case rested on its own circumstances; that where the action was for a wrong suffered since sequestration, caution ought not to be required; and that the Court had allowed an action of this kind to proceed without caution in *Heggie v. Heggie*, 6th June 1855. The Lord Ordinary refused the motion, and in the note to his interlocutor observes, that although it seems to have been formerly the rule that the bankruptcy of the pursuer was a ground for asking caution in every case, that rule has been since modified, and the case of Love has been overruled by *Heggie*. He conceives that he is left to exercise his discretion in every case according to circumstances, and that he has accordingly done what he conceives to be right in this case.

## HIGH COURT OF JUSTICIARY.

RAPER v. DUFF.—*Feb. 6.**Game Laws—Trespass.*

This was a suspension of a conviction under the Day Poaching Act, on the grounds—(1.) that the complaint only set forth that Raper “did commit a trespass by entering or being without leave of Mr Duff, the proprietor, on the farm and lands of Mains of Hatton, in pursuit of game,” while his defence was that he was on these lands with leave of the tenant, his master; and (2.) that while the offence charged was a criminal one, the complaint had not been signed by the prosecutor himself. The Court sustained the conviction. The Lord Justice-Clerk said:—With regard to the suspender’s first objection, it is sufficient to say that the point is ruled by the case of the Earl of Selkirk, and that the mode of statement employed in the charge is the proper and legitimate one, being in the very terms of the statute. With regard to the second objection, it cannot be contended that the prosecutor under this Act must necessarily appear in Court. This is, no doubt, in one sense, a criminal proceeding. The judgment under it is termed in the statute a “conviction,” and where the conviction is irregular it is brought up here to be quashed. But it is not a criminal proceeding in the strict and proper sense of the term, because it is not necessarily at the instance of the Procurator-Fiscal, nor does it require his concurrence. The rule which obtains in purely criminal cases requiring the appearance of the prosecutor, therefore, does not apply to the present case. The 11th section of the statute prescribed the mode of procedure. It provided “that the prosecution for every offence punishable by virtue of this Act shall be commenced within three calendar months after the commission of the offence; and that, where any person shall be charged on the oath of a credible witness with any such offence before a Justice of the Peace, the Justice may summon the party charged to appear,” etc., and may proceed to hear and determine the case. The foundation of a prosecution under the Act is therefore a charge on oath, not necessarily on the oath of the prosecutor, but on that of any credible witness. We do not mean to rule that a written charge is not necessary; that point is not now before us. Now, the question whether the prosecution is or is not properly authorized is a question for the Justices to determine, and about which they must satisfy themselves. That is not a point for the Court to review, all review on the merits being excluded by the 15th section of the statute, so that nothing but a radical defect in jurisdiction, or a fatal error in procedure, would entitle us to quash a conviction under this statute. Lords Ardmillan and Neaves concurred.

BANNATYNE v. MACLULLICH AND FRASER.—*Feb. 6.**Night Poaching Act—Complaint.*

The complainer, a shoemaker at Rothesay, was charged, in a complaint at the instance of the defenders, who are procurators-fiscal there, with an offence under the Night Poaching Act. Their complaint averred that Bannatyne and another person did—(1.) “unlawfully enter with one or more nets, engines, or other instruments for the purpose of taking or

destroying game in or upon one or more outlets, gates of, or upon the public road," in a locality there described, near a certain field, "and did then and there kill or destroy a hare; (2.) or otherwise, time above libelled, unlawfully enter in or upon the said field above libelled, with one or more nets, engines, or other instruments, for the purpose of taking or destroying game." The Justices convicted Bannatyne of "unlawfully entering," etc., and of "unlawfully killing" the hare, and also of the second offence; and sentenced him to three months' imprisonment with hard labour. The suspender pleaded that the complaint was informal, in respect that the essential word "unlawfully" was applied not to the killing of the hare, but to the entering upon the public road, which was not an unlawful act, and also because the suspender was convicted of both offences cumulatively, which were only charged as alternative in the complaint. Lord Ardmillan thought there were two objections conclusive against this conviction. He was not for giving effect to the objection as to the date of the warrant, as no objection had been taken at the time. But the first fatal objection to the regularity of the procedure was, that the complainer had applied the word "unlawfully" to entering upon the public road, which could never be unlawful, and had omitted it as to the killing of the hare, which might be an unlawful act. The Justices had inserted the word "unlawfully" to apply to the killing of the hare, but neither in reason nor in grammar could that be done. The second objection was, that the charge was laid alternatively, and the finding of guilty was cumulative. He held it as settled that where a public prosecutor says in his complaint—"You did one thing, or you did another thing," that the finding that the one thing was proved excluded the finding of the other proved; and the Justices had no more right to convict of both these alternative offences than they would have had to convict of an offence which was not charged at all. The other judges concurred, the Lord Justice-Clerk observing that it was difficult to say whether the complaint or the conviction was the most objectionable. The complaint was drawn in a most slovenly manner, and it showed that the person who wrote it had not been at the pains to read and understand the statute. The conviction was disconform to the charge, and showed an attempt on the part of the Justices to amend in the conviction a plainly irrelevant complaint, and also so great an ignorance of the usual forms of criminal courts as to give a cumulative finding of guilty on an alternative charge.

MACDONALD v. M'DONALD.—Feb. 6.

*Relevancy—Breach of Trust.*

The complainer, a constable at Airdrie, was convicted by the Sheriff there of breach of trust and embezzlement, in having applied to his own use a fine which had been entrusted to him for payment. He now raised a process of suspension, on the ground that there was no relevant charge of embezzlement in the complaint (which narrated the circumstances), and that the charges were not proved. After hearing counsel in support of the complainer, the Court unanimously held that there was a relevant charge of an offence well known to the law; and that the man was well off in not having been charged with an offence equally well known to the law, and of a graver nature.

## BENNET v. HINCHY.—Feb. 6.

*Oppression—Stat. 9 Geo. IV., cap. 39.*

This was a suspension of a conviction under the Salmon Fisheries Act. The act was averred to have been committed on the 10th of October; a warrant was procured on the 3d of November; and the complainer (a weaver at Brechin) was apprehended, tried, and convicted on the 7th of November. He raised this suspension, on the ground of oppression, and certain special objections to the complaint. The Lord Justice-Clerk said the first objection of oppression was the most important, because it is the best of all when made out. At first sight there was an appearance of awkwardness in the summary way in which this lad was brought up and convicted, but that is the sort of procedure contemplated by the statute. But the statute does not assume that a party shall not get time if he asks for it. It is averred that he stated to the officer that he was in a position to prove an *alibi*, and that he would require to cite witnesses, but the officer had no right to listen to anything of the kind; he was only sent to apprehend him, and is a mere machine. The proper time to state that he required to cite witnesses was when he was put upon his trial, and if the Justices had refused to give time, then there would have been a case of oppression; but he did not ask time, although he must have known that he ought to do so if he really wanted it. He was far from saying that too great latitude in place or time could be made the ground for quashing a conviction of an inferior court, if the objection had been taken in the inferior court. The prosecutor might be prepared to strike out the words by which too great latitude was taken, or show why he required so great latitude, and in doing so he might appeal to the local knowledge of the Justices. The other Judges having concurred, the suspension was dismissed with expenses.

## BIRREL v. JONES.

*Day Poaching Act—Apprehension.*

The complainer was convicted, under the 6th section of the Day Poaching Act, by the Annan Justices of assaulting John Affleck, gamekeeper to Colonel William Graham of Mossknowe, when trespassing in pursuit of game on Dornoch Moss, he having been convicted immediately before of trespassing in pursuit of game on the 1st section of that Act. He contended that, to make a relevant charge under the statute, it was necessary to state that he was in the pursuit of game without the leave of the proprietor; and also that the gamekeeper had no right to apprehend any one unless he had required the person forthwith to quit the land, and also to tell his name. The Lord Justice-Clerk said that the objection that it was not stated that the complainer was trespassing without leave was answered by this, that a trespass can't take place at all unless without leave. The other objection, that this complainer was not asked his name, surname, and place of abode, would land the construction of the statute in inextricable absurdity. The true rule of construction evidently was *applicando singula singulis*. Whoever refuses to tell his name when required is an offender, and he who refuses to quit the land when required to do so is an offender also. Going through the gamekeeper's catechism in the manner proposed, would

be both difficult and absurd. Before the gamekeeper has got through half his questions, the man would of course run off. In its first and rough form the conviction was defective, and might not have stood; but it was corrected in the second form, and he was far from holding that Justices, if they found a conviction bad before anything was done on it, might not put it in the fire and have one drawn in correct form. The other objection, that one Justice only signed, was one on which he had as yet no opinion, and there was a need for further argument and for information concerning the statutory history of the constitution of J. P. Courts. The further consideration of the case was accordingly postponed.

## English Cases.

**RIGHT OF WAY.**—Where a right of way exists across a brook by means of sixteen stepping-stones, the surveyors of the highways have no right to alter the mode of passage by removing the stones, and placing instead upright stones with flags across them.—This was an appeal on a conviction for obstructing the highway. Argued for the respondents—The right of footway over the brook is the substantial thing, and it was clearly the duty of the surveyors to keep it in proper order. For this purpose they had power to remove the worn-out stones, and to replace them in a more convenient manner. They had a right, for the safety of the public, to place flagstones upon the new upright stones. *Per curiam*,—The act of putting down flags on higher stepping-stones is enlarging the public right, which the surveyors cannot do. It is not contended that a permanent bridge can be placed over the brook, and yet the placing of flagstones on the upright stones is of that nature. The overseers can only repair the way across the brook with stepping-stones. Conviction quashed, and judgment given for the appellant.—(*Sutcliffe v. Surveyors of Highways of Sowerby*, 8 W. R. 40.)

**POLICY OF ASSURANCE.**—*False Statement—Description of Assured.*—The plaintiff kept an ironmonger's shop at Birmingham, and resided at Saltley Hall, in the county of Warwick. The declaration or proposal sent in previously to the effecting of the policy required that parties intending to insure should state their names, residences, occupations, or professions, and also other particulars. In this instance the applicant was described thus, "Isaac Thomas Perrins, Esq., Saltley Hall, Warwickshire." There was a proviso in the policy, that if any statement or declaration contained in the declaration or proposal should be untrue, or if the policy should be obtained by any misrepresentation, concealment, or untrue averment, the policy should be void and of no effect. There was no evidence that Mr Perrins was not an "esquire." By the rules of the defendants, esquires, gentlemen, shopkeepers, and others, were in the first class of least risk; other classes included persons who followed more hazardous callings of various kinds. *Held*—That the omission to state his occupation did not nullify the policy (*diss. Cockburn, C. J.*). Hill, J.—"The question is, whether the statement was untrue. It is all true, but imperfect, as it does not go fully into the occupation. Suppose a person who was a wine-merchant and banker was to put himself down as banker only, would that be an untrue statement? A tradesman may be a borough magistrate, and if he describe himself as esquire, justice of the peace, is his description imperfect because he omits to mention his trade? I think not. Since the defendants have sought to take advantage of the breach of a condition, they are bound to bring themselves clearly within the breach; but as they have failed to do so, the plaintiff is entitled to judgment."—(*Perrins v. Marine and General Travellers' Insurance Co.*, 8 W. R. 40.)

**MASTER AND SERVANT.**—4 Geo. IV., c. 34, § 3—*Conviction for Non-Performance of Contract of Service.*—The appellant, having previously bound himself to Pigott for five years, made a contract with the respondents to serve them for the same period. The appellant, when called upon to do so, refused to enter the service of the respondent, alleging as a reason his previous engagement to Pigott. *Held*—That, under these circumstances, the appellant was not liable to the penalties imposed by 4 Geo. IV., c. 34, sec. 3, for not entering the service of the respondents according to his contract, inasmuch as he could not do so without rendering himself liable to a penalty for absenting himself from the service of P. Cockburn, C. J.—“I do not think that the appellant is liable, for this simple reason, that the Act of Parliament does not make it an offence for a man to enter into a contract which he is unable to perform; and we cannot hold otherwise than that, when the fulfilment of the contract is impossible except by a breach of the law, then the penalties of the statute do not attach. According to the construction put on this statute by the case of *R. v. Turner*, the words ‘absent himself’ in s. 3, mean ‘absent himself without lawful excuse;’ and so here the question would be, whether the appellant refused to enter the service of the respondents ‘without lawful excuse.’ I think that it is a lawful excuse for a man to say that he cannot enter upon the service which he is called upon to enter without rendering himself liable to a criminal prosecution. It is true that, inasmuch as he has brought this state of things upon himself, this would be no answer if he were sued by the respondents in a civil action for a breach of contract; but, where it is sought to make a man criminally responsible for neglecting to do certain acts, I think, without hesitation, that it is a sufficient answer to say that the performance of those very acts which he is called upon to perform would render him liable to criminal proceedings.”—(*Ashmore v. Horton*, 8 W. R. 43.)

**STAYING PROCEEDINGS.**—*Les alibi pendens.*—The plaintiff was a merchant in Liverpool, and the defendant carried on business in South Carolina, in the United States of America. A contract had been entered into, at New York, between the plaintiff and the defendant for the purchase by the defendant of certain cotton then on its way to England, and which cotton the defendant had afterwards refused to receive. An action was brought against the defendant in New York by the assignee of the contract, but was moved into one of the federal courts, where it must be in the name of the plaintiff as at common law. The defendant came to England, whereupon the present action for the same cause was commenced against him. A rule was now moved for to show cause why the proceedings should not be stayed. The learned counsel could rely on no reported authority, but mentioned that there had been a case where proceedings having been taken, in the British Consular Court at Constantinople, and an action commenced here for the same cause and money paid into Court, Coleridge, J., had stayed the proceedings in the action here and left the money in Court; and now the general power of the Court to prevent injustice being done by means of its process was only relied on. Erle, C. J.—“I am of opinion that this rule ought to be refused. It is an application without authority to support it; and though there may be hardship that property may be doubly perilled, possible hardship is not a sufficient ground for our interference. If there were judgment in one country, I should expect that the Court in the other country would stay the proceedings.” Rule refused.—(*Cox v. Mitchell*, 8 W. R. 45.)

**CRIME.**—*False Pretences—Evidence.*—Upon indictment for obtaining money by false pretences in change for a bank note, it was proved that the note was the note of a private bank, which had paid a dividend of 2s. 4d. in the pound, and no longer existed; and that a neighbouring bank would not change it. *Held*—That the above was not evidence from which it could be inferred that the note was of no value whatever. Pollock, C. B.—“It is probable that this case might have been put to the jury, and that they might have found their verdict in such a way that a conviction could be sustained; but as the case is stated, the only question for us is, whether there was evidence that the note was of no value.



There is no evidence that the note was not of any value. Upon these facts it might have been of some value. Upon the case, therefore, as it is presented to us, the conviction cannot be sustained."—(*Reg. v. Evans*, 8 W. R. 48.)

**WILL.—Domicile of Origin—Will Valid by Law of France.**—The executors (defendants in the cause) of A., a widow, propounded her will, bearing date the 4th of November 1857, and which was made in England, and executed according to the provisions of 1 Vict., c. 26. A.'s next of kin, the plaintiff, pleaded, that at the time of making her will, and thence until her death, A. was domiciled in France, and that the will was not made in conformity with the laws of France. The surviving executor, as defendant, replied, (1) That A. was not domiciled in France: (2) That the will was made in conformity with the laws of France. *Held*—That, in accordance with the judgment of the Master of the Rolls in *Somerville v. Somerville* (5 Ves. 786), the domicile of origin must prevail, until the person whose conduct is in question has manifested and carried into execution an intention of abandoning it, and of taking another as his sole domicile. That the evidence adduced by the plaintiff in support of A.'s abandonment of her English domicile, and of her acquisition of a new domicile in France, not being clear and conclusive, the will propounded was entitled to probate. That even if the Court had been of opinion that the deceased had abandoned her English and acquired a French domicile, inasmuch as, according to the uncontradicted evidence of a French advocate, the will was valid by the law of France, the Court would have been bound to pronounce for it. *Semble*—"By the law of France, a will made by a domiciled Frenchman, during the most temporary residence in a foreign country, would be valid if executed according to the law of that foreign country."—(*Crookenden v. Fuller*, 8 W. R. 40.)

**JOINT STOCK COMPANY.—Contributory—Transfer to avoid Liability.**—In a company, the shares of which passed by delivery, a shareholder, desiring to get rid of his liability, sold his shares to a warehouseman of his own, a few days before the order was made for winding up the company. The market price of the day (which was only a nominal sum) was professed to be paid, but even that sum came out of moneys held by the transferee in trust for the shareholder. *Held*—That this was not a *bona fide* transfer, and the shareholder's name was placed on the list of contributories. The Lord Chancellor—"The only thing we have to determine is, whether these two gentlemen ought to remain in the list of contributories of this company. According to the decision of this Court, to which I must respectfully bow, if it had been proved that they had parted with all interest in these shares, although it was for the express purpose of getting rid of the liability, and although they knew they were of no value, and although they knew that the transferee was a man of straw, they would have been absolved from liability, and ought to be removed from the list of contributories. I confess I should have hesitated before I concurred in these decisions, because I think there might have been a considerable difference drawn between the case of an assignee of a lease assigning the lease to a man of straw, and a shareholder, who has become a partner with others, and who has incurred a joint liability, his sole object being to throw the liability entirely on his copartner. According to those decisions, it is incumbent upon a shareholder to prove that he has actually parted with all interest in the shares. I think that the evidence now before us clearly demonstrates that they have not parted with their interest; that it was a mere fable they were acting; that they intended that all that passed should have no operation whatever *inter se*; because they gave it the shape of being a commercial transaction, a sale of what was valuable, and what was understood to be valuable by the transferrors, and was understood to be valuable by the transferee. That is conclusive to my mind, to show that it was a mere sham, and that it was intended to have no actual operation; therefore I consider these two gentlemen are to be adjudged as still shareholders in this company, and that they were properly placed on the list of contributories."—(*Re The Mexican and South American Company*, ex parte *Hyam*, 8 W. R. 53.)

**TRUST.—Investment—“Heritable Security.”**—This was a petition to the M. R., to obtain his honour's opinion, direction, and advice, under the 22 and 23 Vict., c. 35, § 32, as to whether the petitioners, as trustees of the sums of L.20,000 Three per Cent. Consolidated Bank Annuities, and L.20,000 Three per Cent. Reduced Annuities, to which Mrs Oswald is beneficially entitled, could with her consent in writing, safely and properly under the provisions of the above-mentioned Act, advance Captain Oswald the sum of L.10,000 upon the security of real estate in Scotland by way of mortgage. Two questions arose: the first was, whether the 32d section, above cited, was retrospective, and was applicable to trusts created before the passing of the Act; and the second, whether the 33d section, which declares that “this Act shall not extend to Scotland,” would be an impediment to trustees investing trust-funds in real securities in Scotland. Osborne, for trustees, the petitioners, argued that the 32d section of the Act was retrospective. It was quite clear that the 30th section was so, and it seemed to be but consistent with the tenour of the Act to hold the 32d retrospective also. That with regard to the Act not extending to Scotland, the expression “This Act shall not extend to Scotland,” was a common expression at the end of every Act of Parliament, and ought not to have any specific effect on the preceding section of the Act. The M. R. said—“The 32d section must be taken to be prospective, and intended by the Legislature to refer to instruments executed after the passing of the Act. With regard to the second question raised, as to whether trustees can invest trust-funds on real securities in Scotland, assuming that a trustee has the power, I as a trustee would not do it. The fact of the proposed mortgagee being in this instance at the same time the husband of the *cestui que* trust, an additional difficulty arises. Under all the circumstances of this case, I cannot advise the trustees to make the proposed investment.”—(*Re Miles' Will*, 8 W. R. 54.)

**SOLICITOR AND CLIENT.—Security—Agreement not to Redeem for Twenty Years.**—A bill was filed by a mortgagor for redemption of a mortgage made in 1855, which contained an agreement that the mortgagor should not pay the money or institute any proceedings in equity for the redemption of the estate till twenty years from the date of the mortgage. The mortgagee was the solicitor of the mortgagor. *Held*—That such a stipulation made by a solicitor with his client was contrary to public policy; and that, there being no evidence to show that anything had been done to relieve the petitioner from the pressure arising from the relation, the petitioner was entitled to redeem. Stuart, V. C.—“It seems needless to consider what effect the clause would have in the then existing right to redeem the previous charges, because there are circumstances in the case which make it desirable to dispose of it on much higher grounds. The clause in question is a contract between solicitor and client. If it has an effect in any material degree prejudicial to the ordinary rights of a mortgagor, and is unusual in its terms, the solicitor must show that his client had sufficient advice and assistance to relieve him from the pressure arising from the relation of solicitor and client. There is very little doubt as to the injurious effect of such a clause upon the interests of the client. It tends to keep him and his estate in the hands of the solicitor. It makes it difficult, if not impossible, for him to borrow any further sum on the security of the estate from any other person than the solicitor, or on any other terms than the solicitor prescribes. It tends to fetter the client in his right to change his solicitor. The stipulation is of a kind so hard upon the mortgagor as to be certainly unusual as between mortgagor and mortgagee. It is against public policy, and contrary to the law of this Court, that any solicitor should be permitted to make any bargain or contract with his client for his own benefit, and injurious to the interests of the client, so long as the relation of solicitor and client subsists, or unless enough is done to extricate the client from the pressure of the relation, and to secure to him other adequate advice and assistance. There are no circumstances to relieve the defendant's case from the defect that his client had not sufficient advice or protection in the matter of this

unusual and disadvantageous stipulation. It seems to me, therefore, that the plaintiff is entitled to a decree for redemption."—(*Cowdry v. Day*, 8 W. R. 55.)

**SPECIFIC PERFORMANCE.**—*Railway Company—Acquiescence.*—A railway company, after allowing a person to construct, at his own expense, and under their sanction and superintendence, a junction for the conveyance of goods between his premises and their railway, and after allowing such junction to be used for 2½ years, will be held, in the absence of any formal written contract, bound by acquiescence, and not entitled, at their own option, to determine the user which has been so long enjoyed.—(*Laird v. The Birkenhead Railway Company*, 8 W. R. 58.)

**MERCHANT SHIPPING ACT, 1854.**—17 and 18 Vict., c. 104, secs. 188, 195, 196, 199, 200, 201.—A ship was lost at sea, and all hands perished. At the time the ship was lost, five months' wages were due to one of the seamen, but a certain sum had been paid to his wife under an allotment note. Information was laid by the shipping-master at Sunderland against the shipowner, under sec. 196 of 17 and 18 Vict., c. 104, to recover the whole wages and the penalty imposed by that section, but the justices refused to make any order in the matter. *Per curiam.*—We think that the justices ought to have made an order for the sum due for wages, after deducting the sums paid to the wife under the allotment note. We do not think that the Board of Trade ought to claim more than that, there being no doubt upon the facts that that is all which is really due. We do not think that the appellant is entitled to ask for the imposition of a penalty, there having been no wrongful refusal on the part of the shipowner to pay these wages, such as to render him liable to the penalty imposed by sec. 196. Judgment for the appellant accordingly.—(*Lambion v. Smurikwaite*, 8 W. R. 61.)

**BANKRUPTCY.**—*Indictment for Perjury—Evidence—Title of Act of Parliament.*—An indictment for perjury, committed by a bankrupt before the Insolvent Court, at an adjournment after his first examination, alleged that he was a trader, owing debts less than L.300, and other matters. The petition upon which the prisoner had applied to the Insolvent Court alleged the very same matters as facts, upon which, with others, he rested his application. *Held*—That the petition, whilst uncontradicted by conflicting testimony, was evidence to prove the allegations in the indictment. The indictment alleged that the prisoner, after the passing and coming into operation of certain statutes, to wit, on the 20th May 1859, presented his petition. It inaccurately described the time when two of the Acts were passed; and though it purported to set out the titles of the statutes in *hæc verba*, inaccurately described the title of one of them. *Held*—(1) That with regard to the time when the Acts were passed, it was competent to the judge at the trial to amend by striking out the words describing it: (2) With regard to the misdescription of the title, which was not amended at the trial, that since it was manifest that the reference was made to the statute only to indicate that the petition was presented after the passing of that Act, of which there was a sufficient allegation in the words mentioning 20th May 1859, the reference to the statute might be altogether rejected. Pollock, C. B.—“That where the title of a statute is so described in an indictment as to enable the Court to know with certainty what statute is referred to, an inaccuracy in such description is immaterial.”—(*Reg. v. Westley*, 8 W. R. 63.)

**ARBITRATION UNDER LANDS CLAUSES CONSOLIDATION ACT.**—Where the submission to arbitration contains matters not comprised within the provisions of 8 Vict., c. 18, the Court has no power to set aside the award on the ground that the arbitrator has not made the declaration required by sec. 33, even if that were a valid reason for setting aside an award made upon a submission within the Act, as to which, *quære*. In any case the Court would require to be satisfied that the party applying was ignorant of the omission until after the award was made, and for this purpose the affidavit of his attorney alone is not sufficient.—(*Re Levick and the Epsom and Leatherhead Railway Company*, 8 W. R. 66.)

**PARLIAMENT.—Vote—Place of Abode of Objector.**—In the form No. 5 of the notice of objection given in schedule A to the statute 6 Vict., c. 18, the "place of abode" of the objector means his place of abode at the time of signing the notice; and, therefore, where the objector, in such a notice, inserted as his place of abode the place which appeared on the register of voters as his place of abode, and at which he was not residing at the time of signing the notice of objection, but from which he had removed to another place,—*Held*—That the notice of objection was insufficient. *Erle, C. J.*—"The objector is bound by the Act of Parliament to give his place of abode, and the question was argued whether 'place of abode' means (when it has been changed since the last registration) the place on the register which was his place of abode at the last registration, or his present place of abode. I am of opinion that the words, in their ordinary acceptation, would mean the present place of abode; but I consider that it was a decided question when the case of *Knowles v. Brooking* was before this Court, and it was decided by a majority of the judges of this Court that the insertion of the present place of abode was a compliance with the Act of Parliament; and I am at a loss to know how I can say that the Legislature intended that it might be one or the other at the option of the objector. I think the Legislature meant that it was to be one of them to the exclusion of the other, and I consider that I should conflict with that decision if I held that the insertion of the past place of abode was also a compliance with the Act of Parliament."—*Melbourne v. Greenfield*, 8 W. R. 67.)

**WILL.—Construction—Additional Legacy.**—Testator, by his will, gave a legacy of L.500 of his pure personal property to a charity. By a codicil he "gave and bequeathed to the same charity the sum of L.1000." *Held*—reversing the decision of *Wood, V. C.*—That the second legacy was not only cumulative but "additional," and subject to the same conditions as to payment, etc., as the first legacy, and was, therefore, payable out of pure personalty.—(*Johnstone v. Lord Harrowby*, 8 W. R. 105.)

**WILL.—Accumulations—Thellusson Act (39 and 40 Geo. III., c. 98), sec. 2.**—A bequest of shares in the *Globe* newspaper to C. for life, with the direction that all the income above a certain amount was to be reserved as a kind of sinking fund. *Held*, on appeal from the M. R., That, being a *bonâ fide* provision for the payment of debts, even though they were mere possible liabilities at the testator's death, it was within the protection of the 2d section of the Thellusson Act. The Lord Chancellor said that the accumulation in question was forbidden by the general words of 39 and 40 Geo. III., c. 98, sec. 1. But sec. 2, by way of proviso, introduces the exception of any provision "for payment of debts of any grantor, settlor, or devisor, or other person or persons." The object was to prevent, beyond certain limits of time, accumulation of property, which might be dangerous to the public, and to allow the power of accumulation to remain, where *bonâ fide* exercised for certain specific purposes. "It is not pretended that the testator, by directing that any sum which might accrue from the four shares above L.200 a year 'should be reserved as a sort of sinking fund for the protection of the shares,' meant to rival Mr Thellusson, and to create a fund which might make his descendant too wealthy for a subject. His good faith in making a provision for the security of those who were to take the shares under his will was not disputed. He himself, along with other shareholders, had executed articles of partnership, by which he covenanted to contribute to all the debts and charges of the newspaper. This, like other literary speculations, was subject to vicissitude; and although in the result there was a considerable sum accumulated from the overplus beyond the L.200 a year, in some years the profits of the shares did not reach that amount, and it was necessary to supply the deficit from the accumulation fund. Debts might have been incurred by the concern, for which the representatives of the testator, or his legatees of the four shares, might have been liable to a much larger amount, and which might have rendered the shares subject to sale or forfeiture.

The accumulation, therefore, was certainly a provision for the payment of debts. Objection was made that these are not the debts of the grantor, settlor, or devisor. But the statute goes on to say, 'or other person or persons.' The main contention on the part of the appellant, however, was that the debts must be past debts; and a dictum was quoted of Lord St Leonards, in *Barrington v. Liddell*, where that great judge, commenting on the statute, is reported to have said, 'It is clear that the provision as to debts must relate to the past debts.' But this is not an intimation that it must relate to past debts exclusively; and he goes on to finish his sentence by adding, 'and nobody can deny that a man being able by his will under this Act to provide for his debts generally, this will include his future debts.' It was admitted, that if this deed had made the testator's executors directly liable to be sued for these debts, the debts might be considered as his. And the partnership deed seems to amount to a covenant by each partner, that there shall be a remedy in respect of each share for future charges upon the partnership. The accumulation directed by the testator in the present case, being thus to be regarded by a *bond fide* provision for payment of debts within sec. 2 of the Thellusson Act, there has been no violation of that Act; and the question as to the disposition of the fund which arose from the accumulation after twenty-one years from the death of the testator, argued upon the supposition that this accumulation was unlawful, does not arise."—(*Varlo v. Faden*, 8 W. R. 107.)

**WILL.—Construction.—Kin.—"Relations."**—Testator gave a moiety of his real estate to his wife for her life, and ordered the other moiety to be applied to the maintenance of his daughter; and after the death of his wife, he gave all his real estates to his said daughter, her heirs, etc., "provided, nevertheless, that in case of the decease of his said daughter, without lawful issue (and his said wife her surviving), then and in such case, he bequeathed such last-mentioned estates to his said wife, and after her decease, to his relations, share and share alike." *Held* by the M. R.—That the words "next of kin" meant relations of the testator at the time of his death, and not his relations at the death of the tenant for life.—(*Lees v. Massey*, 8 W. R. 109.)

**PRESUMPTION OF DEATH.—Practice.—Chief Clerk's Certificate.—Onus of Proof.**—Where a party had not been heard of for seven years, *Held*—That the presumption is not in favour of his having died during the first half of that period, although it is equally a presumption that he did not die at the end of the second half; it being a preliminary presumption of law that a party living at a given time is alive at a subsequent time within a reasonable limit. In this case the deceased William Orton had left London suddenly, where he was residing for upwards of seven years with his wife and family, and had not since been heard of, although advertisements for him were inserted in the principal London newspapers. The chief clerk had, on a narrative of the facts, found that the testator was dead, and granted letters of administration *de bonis non* to his representatives, and also found that William Orton could not be presumed to have predeceased his uncle Henry, whose estate was to be administered. Kindersley, V. C.—"The presumption on the ordinary chances of life would be, that this young man would survive his uncle the testator, although that was not a conclusion; for, *ceteris paribus*, the uncle might survive the nephew. William Orton, who was living in November 1827, might be presumed to be living in January 1831. The first presumption of law was, that a man who was living at a given period was alive at some subsequent time, within a reasonable limit. It was competent to rebut that presumption by evidence, or a counter-presumption. Positive evidence there was none. In seven years he would be presumed to be dead; but the presumption would not be that he died at any given period. Why was the Court to assume, in this case, that the party died in the first half of the seven years, rather than the last? The chances were equal, except with respect to the advertisements, which, as to some of them, were issued in the last half; but this was a probability only, not a presumption, that William Orton was dead before January 1831. The *onus* of showing, by proof, that he

was not alive, was on the party asserting that he was not, not on those who contended that he was next of kin ; although, of course, that might be rebutted. The Court was now asked to presume that the party died within the first half of the seven years, quite contrary to the decision in the case cited. There was not sufficient to rebut the preliminary presumption of law, that he was alive during the first half. For these reasons, William Orton could not be cast out of the category of next of kin."—(*Lambe v. Orton*, 8 W. R. 111.)

CONFLICT OF JURISDICTION.—*Scotch Arrestment*.—A policy was effected by A. upon his own life in an insurance office carrying on business both in England and Scotland, and assigned to B. as security for money advanced. A. and B. were both domiciled in England, but B. having estates in Scotland, they were sequestrated according to the law of Scotland for the benefit of his creditors ; and after his death, the policy money was arrested by order of the Court of Session, in pursuance of the sequestration. Afterwards, B. filed a bill in the English Court of Chancery for payment of the amount due to him on the security of the policy, and the Vice-Chancellor directed the fund to be paid into Court without prejudice to the Scotch arrestment ; and when the cause came to a hearing, decided on the rights of the parties, and directed the fund to be paid to the plaintiff. The principal defendant having been guilty of *laches* in bringing the appeal, and having shown acquiescence in the decision of the Vice-Chancellor, his appeal was dismissed with costs. Observed by the Lord Chancellor : "The decree of 13th December 1858 appears to be erroneous ; and had there been an immediate appeal against it, I think that it ought to have been reversed. I do not question the jurisdiction of the Court of Chancery over the subject-matter of the suit. I consider it wholly immaterial that M'Cubbin was domiciled in Scotland ; and whether the assurance company is to be considered as domiciled in Scotland or in England, or in both countries, signifies nothing. But the Court had jurisdiction to stay the proceedings in Chancery, on reasonable terms, till the Scotch suit should be determined, and in my opinion ought to have done so. This is not a case of conflict of jurisdiction, or depending upon the comity shown to each other by the tribunals of different states, according to the law of nations. This case was very properly likened, during the argument, to similar suits having been brought in England in the Court of Exchequer, while that Court still possessed equitable jurisdiction, and in the Court of Chancery. A suit having been commenced in the Court of Exchequer, if after bill and answer a suit had been commenced in the Court of Chancery exactly for the same cause, I conceive that the indecorous spectacle would not have been exhibited of the two courts running a race against each other, and that the Court of Chancery would have forborne to make a decree in the very matter on which the Court of Exchequer was deliberating. In the present case there was no clashing between the law of England and the law of Scotland ; and I see no superior convenience in adjusting the balance between Venning and Robertson in England rather than in Scotland. On the contrary, an interdict had been regularly granted against removing from Edinburgh the accounts and documents by which the balance was to be ascertained. The slow pace at which the Scotch Court was said to be advancing cannot gravely be assigned as a reason for anticipating its decision. The suit in the Court of Session was not commenced till September 1857, and little more than a year had elapsed before the decree finally deciding the matter in dispute was pronounced by the Court of Chancery. I do not find any *laches* on the part of M'Cubbin in the interval ; and it would hardly have been said in the Court of Chancery in former times, that a court is to be superseded because it may be somewhat tardy in giving final judgment. At the bar, it was assumed that the certificate of the chief clerk was proof that M'Cubbin had no merits, and that he was vexatiously attempting to prevent Venning from realizing a just claim. But the propriety of the decree of the 13th of December 1858 cannot be supported by the result of the inquiry made under it before the chief clerk in London. If that inquiry ought never to have been directed, I must likewise

observe that this decree is not quite consistent with the order of the 21st of April 1858, which ordered the money to be brought into Court 'without prejudice in any manner to the Scotch letters of arrestment and the execution thereof.' The letters of arrestment seem to be rather prejudiced when the money arrested is paid to Venning as his property under a decree of this Court. What is to become of the Scotch action of 'count and reckoning?' The jurisdiction of the Court of Session continues; and if there should be a decree of that Court ordering Venning to pay the L.5375, 6s. 10d. to M'Cubbin, to be divided amongst the creditors of Robertson, how is this decree to be enforced? To avoid such an unseemly conflict, I think that on the 13th of December 1858, the Vice-Chancellor Sir William Page Wood should have pronounced an order similar to that pronounced by the Vice-Chancellor Sir John Leach, in *Elliot v. Lord Minto*, 6 Mad. 16, 'That the suit should stand adjourned till the determination of the suit for the same cause depending in Scotland.' Had the English suit been first commenced, I conceive that the Court of Session, although having jurisdiction over the subject-matter, would not have permitted a second suit to proceed there; and it would appear from *Bushby v. Munday*, 5 Mad. 297, and the authorities collected in the case of *The Carron Company v. M'Laren*, 5 H. L. Ca. 416, that although the Court of Chancery cannot act directly to stop a suit improperly prosecuted in another country to determine questions which ought to be adjudicated upon here, it will stop the prosecution of such a suit by granting an injunction, to operate indirectly, upon the person who so attempts to prosecute it." [The proceedings in the Court of Session were reported lately in the *Journal*.]—(*Venning v. Lloyd*, 8 W. R. 117.)

INSURANCE.—*Vendor and Purchaser*.—S. contracts in writing to purchase a leasehold house of D. and his co-trustees for sale. The house is held under D. college, and there is a power of re-entry and avoidance of the lease on non-performance of any covenant. The insurance of the house being about to expire, D. renews it so as just to extend beyond the day appointed for completion. The purchase is not completed on that day, and the insurance expires. On a subsequent day, when the parties meet to complete, the fact of the policy having dropped is discovered; but the purchaser's solicitor offers to complete if a waiver of the forfeiture is obtained; this the plaintiff's solicitor declines, although afterwards a waiver is obtained. The purchaser refuses to complete; and on bill filed by D. to enforce specific performance against S., bill dismissed without costs.—*Per Kindersley, V. C.*: If the fact of an insurance being about to expire after the day appointed for completion and acceptance of title is known to a purchaser, and on being applied to for the means of renewing it he refuses to afford them, the Court would enforce performance against him. The omission of a vendor to inform a purchaser of the day on which a policy of insurance on the premises will expire, followed by a forfeiture of the lease, is not sufficient to put an end to the contract.—(*Dowson v. Solomon*, 8 W. R. 123.)

SALE OF SHARES.—*Joint Stock Company*.—B. was manager of a company, of which C., D., E., and F. were directors. He also held shares on which calls were payable. The board was to consist of seven directors, of whom three were to form a quorum. At a meeting on 28th August 1856, at which C., D., E., and F. were present, a resolution was put and sent to B., that the board, to terminate a misunderstanding, would accept his resignation, and pay him his salary due, etc.—in round numbers, say L.150; and that the members of the board would jointly relieve him of his shares, and guarantee him against any calls thereon; requiring an answer by September 4, the then next board-day, or the directors would not be bound by the terms offered. On September 2, B. replied, accepting the offer. On the 4th, at a meeting of the company, D., E., and F. were present (but not C.), when B.'s letter was read; and a resolution was passed and sent to him, that, having heard his letter read, they accepted his resignation, and required the guarantee, etc., to be prepared. On Oct. 3, B. was informed that the consideration of his agreement was deferred to the

following day ; and at an extraordinary meeting of the board on Oct. 23d, at which C., D., E., and F. were present, it was resolved that B.'s resignation be accepted, and the terms referred to the company's solicitor. The agreement was not carried out by the board ; and B. being afterwards compelled to pay calls, he brought an action against C., D., E., and F. for not having given the guarantee as agreed. It was contended for the defendants that the agreement of the four was not the act of the board. But the Court of Exchequer held that they were bound by the agreement ; for, having held out to plaintiff that it was an agreement of the board, they were estopped or barred from saying that it was not so, and that, if they could not give the guarantee they had promised, they would be liable in damages for not doing so.—(*Barker v. Allan and Others*, 35 L. T. Rep. 167.)

**MARRIAGE.**—*Settlement—Representations to Intended Husband.*—A marriage was contracted in 1839 by P. with the daughter of D., on the faith, as he alleged, of representations made by D., that he would settle his E. estate and a sum of 105,000 sicca rupees on his daughter and the children of the marriage. In 1855 P. died, having by his will devised the E. estate to his niece, and given only L.4000 to his daughter's children. No information could be obtained of any settlement having been in existence. A bill was filed on behalf of the infant children, who claimed to be entitled to the E. estate as against the devisee, and to the sum of rupees out of the testator's estate. *Held*—That the evidence being sufficient clearly to satisfy the Court that the alleged representations were made, and that on the faith of them the marriage was contracted, the plaintiffs were entitled to have the representations made good as against the testator's assets ; and that, subject to the claims of his creditors, they must be declared to be entitled to the property in question.—*Stuart, V. C.* : If the evidence proves with sufficient certainty a representation of this kind, by which the conduct of the contracting parties in the marriage was influenced, the law of this Court, settled in the House of Lords, entitled the petitioners to the relief which they pray. In the case of *Hammersley v. De Biel*, the representation made by the father of the wife was merely of an intention to make a further provision for his daughter and her children of L.10,000 on his death. There was no more than the expression of an intention to leave this sum by a moveable instrument. But inasmuch as the expression of that intention, on such an occasion, had an influence on the conduct of the contracting parties, and was an inducement to the contract, the House of Lords affirmed the decision of the Court of Chancery, and compelled the executors of him who had made the representation to pay the money, and to fulfil that which was expressed as a mere intention. This doctrine, which gives all the force of a binding contract to the mere expression of an intention to do something by an instrument revocable in its nature, is too firmly established to be shaken. It has been acted upon in this Court from an early period. The present case cannot be brought within the application of the principle unless there be clear proof of the representation actually made, and made under circumstances to show that it influenced the conduct of the contracting parties. There must also be reasonable certainty as to the amount and nature of the property to which the representation applied.—(*Prole v. Soady*, 8 W. R. 131.)

**JURISDICTION.**—*Domicile of Wife.*—This was a suit for restitution of conjugal rights. The respondent appeared under protest, and pleaded that he was not subject to the jurisdiction of the Court. The facts established in evidence were as follows :—The respondent, Major Yelverton, was born in Ireland of Irish parents, and when a minor received a military education in England, obtained a commission in the Royal Artillery, and was afterwards stationed at or near Edinburgh. When there, he married in Scotland the petitioner, Maria Theresa, who is said to have been born at Chetwode, in Lancashire. The parties then went to Ireland, were remarried there according to the rites of the Roman Catholic Church, returned to Scotland, cohabited as man and wife there, at



Hull, and afterwards at Bordeaux in France. In April 1858, respondent quitted petitioner at Bordeaux, and returned to Edinburgh, where he has remained with his company ever since, and has constantly refused again to live or cohabit with petitioner. The head-quarters of the regiment of Artillery have always been at Woolwich; the head-quarters of the different battalions—or, as they are now called, brigades—of the regiment were, by general order of the 1st April 1859, removed from Woolwich, and established at various places. The head-quarters of the brigade to which respondent has been attached have not, since that time, been in England. The petitioner asserted in her replication, which was not contradicted, that at the time of the commencement of the suit she was and still is domiciled in England, viz. in Middlesex. The Judge-Ordinary:—The case now to be decided is certainly of much importance, and from the scope of the argument appeared to be involved in considerable difficulty. But upon reflection the point to be determined appears simple and easy of solution. Major Yelverton may have retained his domicile of origin for many purposes, and yet may have been domiciled in England so as to give jurisdiction to this Court. Was he domiciled in England for the purpose of founding jurisdiction? He was not born in England—he was here for some time as a student when a minor; he afterwards passed some time (probably a very short time, for its duration is not mentioned) at Hull, removed thence to Bordeaux, and thence to Edinburgh, where he has remained ever since. He cannot, therefore, be said to have ever dwelt, or had a residence, in England since he obtained his commission; and the case as to domicile must rest upon the alleged legal fiction, that he is supposed to be present at the head-quarters of the regiment of Artillery in which he has a company. No decision or dictum was cited to support that position, nor can I find any authority for it. If that ground fails, upon what other grounds can the petitioner's right to sue in this Court be sustained? This is a court for England, not for the United Kingdom, or for Great Britain; and for the purposes of this question of jurisdiction, Ireland and Scotland are to be deemed foreign countries equally with France or Spain. If this be so, this is a suit against a foreigner, who is not, and was not at the commencement of the suit, within the kingdom of England; who never had any residence in England; who never owed obedience to the laws of England, except during his temporary sojourn; and who is not said to have done anything in England contrary to these laws. His Lordship then went fully into the authorities, citing Story and Boullenois, and the dicta of Lord Lyndhurst in Warrender's case; and concluded by intimating that there was no specialty in the case to take it out of the ordinary rule, *Actor sequitur forum rei*.—(*Yelverton v. Yelverton*, 8 W. R. 134.)

REAL AND PERSONAL.—*Fixtures—Machinery*.—M., the owner of land, in 1853 mortgaged it in fee to O., who in August 1858 sold it to the defendant. M. became bankrupt in September 1858. After the mortgage, and before the sale, M., who had always continued in possession, erected buildings on the land, and set up a steam-engine and boiler, used for supplying with soft water the baths which had been erected on the premises; also a hay-cutter and malt mill, or corn-crusher, and grinding-stones, all (except the grinding-stones) being secured with bolts and nuts, or otherwise firmly affixed to the buildings, but in such a manner as to be removeable without damage to the buildings, or to the things themselves. The upper mill-stone lay in the usual way, upon the lower grinding-stone. All the fixtures were put up for the purpose of trade. They were all firmly annexed to the property for the purpose of improving the inheritance, and not for any temporary purpose. Held by the Court of C. P.—In an action by the bankrupt's assignees to recover the articles so affixed, that when the mortgagor, after the date of the mortgage, annexed the fixtures for a permanent purpose, and for the better enjoyment of his estate, he thereby made them part of the real estate, which had been vested by the deed in the mortgagee, and that, consequently, the assignees of M., the mortgagor, could not maintain the action.—(*Walmsley v. Milne*, 8 W. R. 138.)

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SUMMARY APPEAL FROM SHERIFF COURTS.

SECOND ARTICLE.

A STRANGER visiting the halls of Parliament Square would naturally feel some uneasiness if he should chance to come unawares upon a convocation of black robed and uncanny looking persons, who by the quaintness of their attire, might pass for some monastic conclave of the middle ages, and by the gravity and secrecy of their deliberations, would suggest ideas of resemblance to a diplomatic congress or *conseil d'etat*. The surprise occasioned by such an unexpected meeting would doubtless be reciprocated by the gentlemen to whose proceedings we allude ; for on such occasions the doors of the oak-paneled corridor of the Advocates' Library are carefully barred against all intruders. Now, if the reader supposes we are going to hint at something mysterious or undivulged, we may at once assure him that he is mistaken. The policy of the "Parliament House clique" is not inspired by anything that passes at the meetings of the body we allude to ; nor is their organization directed to the prosecution of any insidious design against the constitution of the country in Church and State. On the contrary, we are happy to say that the deliberations of the Faculty are marked by a decidedly conservative and orthodox tone of opinion, and by a truly British sensibility to the dangers of innovation. An air of serenity and staid decorum pervades its assemblies, which is in harmony with their consultative character ; for, true to the instincts of the profession, the Faculty never originates anything, but merely offers its opinion on such projects of law as may be submitted to it.

It is just possible however, that, before the expiry of the present session of Parliament, we may have to announce the advent of the

first product of the collective wisdom of the Faculty applied to original legislation. That corporation, or rather a committee of its members, is at present in incubation on a Bill; though what is the precise nature of the enactment in contemplation, we have not been able to ascertain. The project originated, we believe, in a movement amongst some of the junior members of the Faculty, which had for its object the restoration of the civil jurisdiction of the Circuit Courts. The subject was recently considered at a very full meeting of the Faculty; and while the gentlemen present seemed to be unanimously of opinion that provision should be made for a summary appeal from the Sheriff on points of law, very decided opinions were also expressed to the effect that a Circuit Court of Justiciary was not the most satisfactory tribunal for the adjudication of such cases. In that opinion we are inclined to concur; though we have already on more than one occasion pressed for a return to the former system, as a simple and practicable step, and as less likely to meet with opposition than any scheme involving the establishment of a new Court of Appeal. But, after the opinions that have been expressed, we scarcely anticipate that the Faculty will report in favour of a restoration of the Circuit jurisdiction; which is liable, at any rate, to two weighty objections. First, the absence of a good library within reach of the Circuit bar, makes it impossible to do justice to any argument founded on legal authorities; and secondly, the limited time allowed for the sittings, makes it impossible that arguments can be heard and considered in a satisfactory manner. Indeed, it would be absolutely necessary, if any real appeal is to be given, to provide for the division of the Circuit Court into two tribunals; so that one of the judges may have leisure to attend to civil business, whilst his colleague is proceeding with the criminal trials. We are fully alive to the importance of having a plurality of judges present on the criminal bench; but we do not see how a deliberate hearing can be secured to the suitor, if appeals are to be taken up, as they were wont to be, at the *fat end* of the criminal sessions, when judges and counsel are alike impatient of delay, and would naturally object to be detained in a circuit town after the serious business of the *assize* was over.

Yet, surely, it cannot be difficult to devise a method of appeal which shall be as summary as that of the Circuit Court, and not more expensive. The disadvantages to which we have alluded in connection with the Circuit appeal court, are incident to that tribunal alone;

they do not arise from the form of procedure, which is simple and well adapted for the purpose. The only changes requisite to adapt the machinery of the existing Appeal Court to the requirements of the time are,—first, the extension of the right of appeal to *all* questions of law arising under the Sheriff's summary jurisdiction; and secondly, to provide for these appeals being taken up without delay at the ordinary sittings of the Court in Edinburgh. To send such cases to a Division of the Court of Session would be simply depriving them of their summary character altogether, and arming litigious defenders with a new engine of delay. But there are the Lords Ordinary—not all fully occupied, but all equally anxious to discharge their duties with fidelity; and to devote a fair share of their time to the interpretation of the law which they are paid to administer. Some of these learned and estimable judges may almost be said to be working on half-time; and they would make just the tribunal we are in search of. Let it be provided that any *two* judges of the Court of Session shall form a court for hearing appeals from the Sheriff on questions of law; and that their decision shall be final except in the event of a difference of opinion; leaving the composition of the Court to be arranged amongst the judges themselves. If this were done, we have no doubt that arrangements could easily be made for holding special courts for such appeals twice or three times a week if necessary. We do not say that these Courts should always be composed of Outer House judges. There never could be any difficulty in forming a quorum, while there are eight Inner House judges on the bench; because one judge can always be spared from either of the Divisions without detriment to the public service—a court of *three* being generally admitted to form, at any rate, as satisfactory a tribunal as any court composed of an even number of members. As for process, the less we are to have of that the better. The words, “I appeal against this interlocutor” indorsed on the interlocutor sheet, should be a sufficient warrant for removing the case from the Sheriff and enrolling it before the Court of Session; and the questions of law in dispute should either be argued on the interlocutor itself without reference to the summons, or on a case stated by the parties and authenticated by the judge, as we suggested in a former article.

Another feature which we deem essential to the successful working of our scheme, is, that the parties should be enabled if they please to bring cases of *any value*, under review in this summary form.

There is a provision in the existing enactments which enables parties to take advocations before the Lord Ordinary, and to consent to his decision being final. This proviso, meanwhile, has proved entirely inoperative; because no party who has already obtained the decision of one court in his favour, cares to tie himself down to abide the decision of another single judge. But if the appellate tribunal were made to consist of two judges of the superior courts, and were recommended by the advantages of cheapness and dispatch, we have little doubt but it would be resorted to in ordinary Sheriff Court actions; and that to so great an extent, as practically to supersede Advocations altogether. We need not dwell upon the benefits which are likely to accrue from a system which ensures uniformity in the administration of the law throughout the kingdom, at a cost which even the strictest votaries of economy will admit to be inconsiderable. But we wish to point out that the saving of time, which many believe to be of even greater consequence, will not be limited to the suitors who bring their cases into the new Court of Appeal. If the result of the new system be to supersede advocations, it is obvious how much this will tend to lighten the Rolls of the Inner House, which have been swelled of late years to an unmanageable extent, mainly in consequence of the facilities given for advocating directly to that tribunal. Without meaning to say that even the provision of a separate Court of Appeal would leave the judges of the Inner House much leisure during session, we may at least look forward to some such measure as the natural solution of a difficulty which has been seriously felt, and must be met without further delay.

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## THE PHILOSOPHY OF LAW MAXIMS.

### 1. INTRODUCTORY—POSSESSION.

WE offer no apology for entering in these pages on the consideration of the Civil Law. A journal which aims at recording the progress of legal literature in Scotland may well rely upon the approval of its readers in its efforts to elucidate one of the most fertile sources of our existing law. Nor are we disposed to waste much argument on the charge of unpracticalness, which is so often urged against these studies. In an age when the mechanical subdivision of labour has been carried into the cultivation of literature, when every branch of knowledge is separated from others, and each obtains its own circle of adherents, it may not be unnecessary to

remind the lawyer who seeks to walk in the higher paths of the profession, of the danger of a fragmentary education. But it would be altogether useless at this late stage of such discussions to combat the position assumed by those who would divorce the practical results of any study from all connection with its principles. Enough has been said and written in opposition to such views to render further argument superfluous; and now the evil must either be endured with patience, or allowed to work its own remedy. And yet it is a singular and, in many respects, a lamentable thing that an obvious fallacy should be productive of such evil consequences. At present, Scotland exhibits the spectacle of a country which, more perhaps than any other European state, is connected, by the spirit and the letter of its legal system, with the jurisprudence of Rome, and yet is more profoundly indifferent than any other to all questions in which that jurisprudence is concerned. Not by any means that there is any lack of opportunity for prosecuting this study. Thanks to the wisdom of our forefathers, ample provision exists, both in libraries and schools, for securing to it full practical effect. But it has been reserved for an age of boasted practical improvement to discredit the ancient standards of legal education. Our institutional authors are witnesses to the ardour with which the writings of the civilians were cultivated in their time. In the present day, under the prevailing scepticism as to ultimate results, and the growing impatience of all intellectual processes, scholarship and the higher branches of legal attainment have gradually been allowed to fall into abeyance.

We assume the importance of our subject, and it therefore falls as little within the scope of our present aim to uphold the authority of the Roman law against those who object to it on special grounds, as against the general arguments of professed sceptics in the value of abstract speculation. But there is one objection which carries with it such an air of plausibility, and has established such a strong position among ourselves, as to entitle it to a short preliminary notice. Paradoxical as it may appear, the assertion is often made, that the very alliance which subsists between the law of Scotland and the Roman jurisprudence is the best of all reasons why the latter may safely be ignored. If it be true, as has been stated, that our institutional authors have borrowed so extensively from the books of the civilians, their labours, it is maintained, have rendered further study of these works superfluous. To this it might be a sufficient answer that a study which asserts pre-eminent claims to the character of a science may fairly plead for all manner of original research. But the error may be exposed on practical grounds, which are more likely to be generally understood. In the first place, it proceeds upon what we cannot help regarding as a very false assumption, that the intrinsic value of the civil law consists in its being studied as a repository of legal rules and maxims. The dogmatic treatment of any science is, undoubtedly, of importance, as

fostering precision and accuracy of thought ; and no one need think of laying claim to a knowledge of the Roman law who has not studied its details with an assiduity that is unknown in this country. But there is a knowledge of principles which is of infinitely greater importance than the acquisition of any number of systematic dogmas. And this knowledge, so far as it concerns the civil law, can only be obtained by a direct reference to the original sources from which that law was taken. The most careful perusal of the Institutes of Justinian, valuable as that study is, will only confer it in a very inadequate degree. For the pith of Roman jurisprudence lies in its historical bearings ; and in a work which aims at condensing the substance of the existing law for purposes of practical instruction, these can only be very imperfectly developed. To comprehend the subject in its essential spirit, it is necessary to go back to the earliest dawn of Roman history, and trace the different phases which the law assumed in its successive course through the dynasties of the Aristocracy, the Republic, and the Empire. Its progress is marked by three great epochs, and the results of the last period can only be interpreted by a knowledge of the previous two. The old *jus civile*, and the system which had its origin in the equitable jurisdiction of the prætor, must be thoroughly comprehended before it is possible to understand the spirit of the legislation of Justinian. And this is a task requiring both independent labour and a careful study of all collateral sources of information. It will be to very little purpose to learn that the famous collections of the Roman law embody principles which were the growth of centuries, if our knowledge of it be confined to a few of its ordinary and more palpable conclusions ; and if, even to this limited extent, we apprehend it through the medium of epitomized and second-hand research. A legal system which has exhibited such remarkable elements of perpetuity, and which, in the words of the historian of the Roman empire, "has been silently and studiously transferred into the domestic institutions of Europe," has surely claims to be studied in a more philosophical spirit.

But the fallacy we are now considering errs, in the second place, upon the grounds of its own assumption. For, admitting the position that the civil law has paramount claims on our regard as a prolific mine of authoritative legal rules, it is evident that such rules are best expressed, and will be best appreciated in their original form. It is unquestionably true that, as brief abstract expressions of the general principles of law, it is incident to their nature that they should operate in different circumstances and under different conditions. It may also be conceded, that one great test of their authority is the extent to which they explain their own meaning. But everybody knows, at the same time, that our perception of abstract truth is greatly assisted by practical demonstration, and all have felt the danger to which principles are exposed of losing on every different application some portion of their primary signifi-

cance. Illustration, better perhaps than argument, will prove this of the doctrines of the Roman law ; and, in our subsequent remarks, we shall endeavour to lay such evidence before our readers.

It might be somewhat difficult to determine the precise limits within which the law of Scotland is to be regarded as of native growth, and beyond which we may accept its doctrines as a mere reflection of the principles of the Roman law. There can be no doubt, however, that we have borrowed from the collections of Justinian to a much larger extent than is admitted, even by many who show no disposition to treat them as independent systems. Peculiar as were the notions that entered into the constitution of the Roman family, it might be shown that they have not been altogether without an influence in moulding the character of our personal relations. It would be a mere fancy to seek in the usages of the feudal system for any traces of the civil law, since the very condition of the existence of the former was the degradation, during many centuries, of the latter, and inasmuch as the one commends itself to our approval, by its recognition of the principles of natural justice and morality, whereas the complete subversion of these principles is a characteristic feature of the other. In personal succession, however, and even in the succession to land, in its more modern aspects, as it is gradually being disentangled from the strict fetters of feudal rule, we see the operation of legal theories which were not unfamiliar to the Romans. But while these are subjects of interesting speculation, their consideration would involve us in historical discussions which it might be difficult to sustain against the charge of practical inutility. In urging a renewed application to this study, we would rather vindicate our precept by a reference to examples of recognised validity. It is just these principles which seem the most elementary, and with which we profess ourselves to be most familiar, that really stand in need of all additional exposition. Existing, from the earliest periods, as a part of our common law, they have gradually acquired a traditional meaning, which fails, in many instances, to express the full force of the circumstances from which they were originally drawn. This is particularly the case when the Roman law doctrine which we have adopted has been handed down, in an abstract form, through the medium of maxims or rules of law. Such rules are, undoubtedly, of high importance, in so far as they furnish convenient illustrations of the principles of law, and embody its substance in a concise and an easily assimilated form. But as abstract and general statements, on the other hand, there is a risk, of course, incidental to their very nature,—the risk, we mean, of being misapplied. And that disadvantage, in so far as relates to the maxims we have borrowed from the Roman law—the *leges legum* of the civilians—is too often accompanied by this further drawback, that our ignorance of the circumstances in which they had their origin has robbed them of much of their significance.



In these circumstances, it appears to us that we shall not be engaged in an unprofitable task, if we select a few of the most currently received maxims in our law, and, by tracing them to their origin, endeavour to ascertain the principles of which they are the general expression. We propose to limit our attention, in the meantime, to such as are the objects of most general use, on the ground that they are those principally concerning which our ideas are inaccurate and ill defined, and that their universal distribution renders it desirable that they should be clearly and intelligently understood. Mere definitions of particular principles, however much they may have run into a stereotyped form, will not engage our notice. Nor shall we pause to consider those general maxims which the Roman law acknowledges only in common with other systems, which are substantially founded upon clear notions of justice and morality. If they have found their way into our law in the precise form which they received from the civilians, that is a mere accident which asserts nothing beyond the significance of language. Our business, at present, is with the aphorisms of the private law which were elaborated by the famous jurists of the classical period of Roman jurisprudence, and have since diffused themselves, to a greater or less extent, through the legal codes of almost every European state.

I. *Possession*.—One of the first of these maxims which we meet with in our institutional books, is the rule,—

*"In pari causa possessor potior haberi debet."*

In equal circumstances, the party in possession is to be regarded as having the better right.

The power which, in Scotland, a factor has at common law of pledging goods in his possession is an illustration of this rule. A more general one may be derived from the principle which obtains in our law, and which, in common with the maxim, we have borrowed from the Romans, that a creditor who receives from his debtor what is legally his due, before the estate has vested in the general body of creditors, or in a trustee for their behoof, and within the statutory limits in point of time, cannot be compelled to refund or to share his relief with others, although the effect of satisfying his claim has been to render the debtor insolvent. In such circumstances, in addition to the favour which is shown to possession, the rule operates, "*jus civile vigilantibus scriptum est.*" We shall have occasion to see, immediately, in considering another rule couched in almost similar terms, some further advantages which the state of possession involves. In the meantime, we propose to take the rule before us as a text for a few observations on the general doctrine. The subject is directly raised by the terms of the rule; and there is no part of the Roman system which more specially commends itself to our approval by its subtle and yet practical distinctions, or has contributed more largely to lay the foundations of

all that we are accustomed to consider as excellent in our own. In the presence of Savigny's great work, it is, of course, unnecessary to attempt anything beyond a very general statement. A few definitions, however, may not be regarded as out of place, in view at once of the intimate alliance which the subject holds with the most elementary principles of our law, and of the prominence which it occupies as the chief topic to be commented on in this preliminary paper. We are the more reconciled to this slight deviation from the general aim which we contemplate, by the circumstance, that in Lord Bankton's Commentary, the only authoritative exposition which we possess of the maxims of the Roman law, those bearing on the doctrine of possession seem to be studiously ignored.

In a primitive state of things, before law has advanced to any considerable stage of refinement, possession is the expression of a very simple idea. It is then nothing more than the counterpart, in point of fact, of the relation which subsists, in point of law, between an object and the person who has exclusive dominion over it. It is, in short, the outward symbol of the right of property. We find, accordingly, in the earliest periods of Roman law, before its provisions had expanded beyond the narrow limits of the twelve tables, that the word bears a construction altogether different from the wider interpretation which it subsequently received. In the old *jus civile*, it is never spoken of, except in so far as it constitutes the full exercise of the right of property, or is recognised as a medium through which property may be gained or lost. But in the days of the jurisdiction of the prætor, the period of the *jus honorarium*, the state of fact was no longer regarded as an absolute measure of the right. It had become evident, from the extended commerce of society, that there subsisted no indispensable connection between the property and the possession of a thing. On the contrary, it was seen that the common intercourse of life required their constant separation. Possession, therefore, which had previously been regarded as a mere question of fact, began now to take its place as an independent principle of law. Under the earlier system, every dispute about property was, in contemplation of law, at the same time, a dispute about possession, and *vice versa*; in the subsequent period, judgment on the one point was not necessarily exclusive of all questions which might be raised upon the other. Still the law, in giving its sanction and lending its effect to the separation between property and possession, established no opposition between the two conditions, but only divested the one of certain characteristics which it transferred to the other. The jurists continued to say, "*Possessio plurimum facti habet*;" but, in corroboration of the new idea, it was added, "*Plurimum ex jure possessio mutuatur*." Hence arose distinctions of the greatest subtlety between the different kinds of possession, according to the different circumstances in which the fact and the right might be partially combined or

partially divorced. These distinctions have passed, with but slight modifications, into our law, and may be shortly noticed here. Possession may be employed in one or other of three senses :—

(1.) In the first place, it has an elementary meaning independent of any distinction between right and fact, and is equivalent to our word “detention.” The analogous expression in the Roman law is “*naturalis possessio*,” or “*in possessione esse*.” This sort of possession indicates nothing beyond the power of operating physically upon the thing at pleasure, and of excluding others from such operation.

(2.) Secondly, possession, in the strict or legal sense, expresses the holding of a thing with the intention of a proprietor—with the *animus domini* (not to be confounded with the *opinio domini*). It constitutes what is generally known with us as natural possession. The corresponding word in the civil law is *possidere*; it had a special significance in that system as the possession which gave a right to the possessory interdicts of the prætor.

(3.) Thirdly, under the title of civil possession, it is employed to signify the holding of a proprietor in and through another who possesses in point of fact, but without the *animus domini*. Such possession depends upon a pure fiction, which, however, received full recognition in the Roman law, and obtains equally with us. The most common illustration of it which occurs in our law is the possession held by a landlord in and through the occupancy of his tenant. It must, however, be added, that the Romans attached a special meaning to the expression, *civilis possessio*, which is quite unknown in our law. In this sense it was applied to that possession depending upon *justus titulus*, and accompanied by *bona fides*, which laid the foundation of Usucapio. In the Pandects, this possession is often put in opposition to the prætorian possession, which gave a title to the interdicts, and the latter is spoken of, in these cases, as *naturalis possessio*.

Such are the various senses in which the word “possession” is employed. We pass over a point so obvious as the requisites for its constitution; the other rule to which we have referred as repeating the substance of the last introduces, at the same time, a collateral point. It is also useful as illustrating the remark which we have made, that the common interpretation of these maxims often fails to express their primary and full significance. Paulus says, absolutely—

“*Melior est conditio possidentis vel defendentis.*”

It is better to be in the place of a possessor or defender.

*Prima fronte*, this rule has a very simple and obvious meaning,—that it is better to be in possession than to dispute it,—that, on the whole, it is less hazardous to defend an action than to institute a claim. The first proposition is affirmed in the familiar *brocard* of ordinary language, that “possession is nine points of the law.” In

this sense the rule is a mere truism, giving expression to the popular notion of the instability of law, and as such readily commends itself to general acceptance. But it embodies, at the same time, a deeper meaning, which the common interpretation does not reach, and which cannot be apprehended without a knowledge of the circumstances which first gave occasion to the rule. It is a result of the deficiency of this knowledge that its scientific application has been co-extensive with the popular construction. Even so high an authority as Professor Bell must be charged with not appreciating its wider import. In his "Principles of the Law of Scotland" he applies it in illustration of the case where a right of action is denied against the possessor of smuggled goods to the party who has primarily induced the fraud. In the fourth edition of this work, at page 22, he says,—“Contracts for defeating the revenue laws are void, and action is denied according to the maxim, ‘*Potior est conditio possidentis vel defendentis.*’ This rule holds in contracts for smuggling, action being denied, if the party who brings the action is aware of the design to defraud the revenue, as, for example, when he is a native of this country,” etc. Here we have an instance of a sound conclusion referred to a false, or, at least, to an inadequate cause. The rule of law in question, at any rate, has only a most indefinite application. Possession is the very pith and substance of the rule, and, in the case assumed, possession is a mere incidence which has no share in determining the result. In refusing action to the smuggler, the law does not contemplate showing any favour to a third party in whose hands the contraband goods may be temporarily placed. The contract is null, because it has been formed in violation of the public policy of the country, and if a benefit accrues to one from the penal liabilities of another, it is an accident which can be traced to no other source than the involuntary operation of the law.

An illustration, on the other hand, which gives full expression to the meaning of the rule may be seen by referring to the circumstances in which it had its source. In the second stage of Roman jurisprudence, judicial intervention was much required in determining questions of possession. Properly, such questions were preliminary to the investigation of disputed rights of property, and, in a strict sense, altogether independent of them, but, practically, the decision in the one case operated, and was meant to operate, on the decision of the other. The first step in the procedure was a decree by the prætor deciding which of the parties claiming property in the subject was to hold possession during the progress of the suit. To this verdict he was assisted by the consideration of various circumstances, as the extent, during the previous year, of the possession founded on, and also the nature of it, according as it was honest and in good faith, or gained, in the technical language of the jurists, *vi, clam, aut precario*. How important it was to succeed in this initial trial, and how much signifi-

cance accordingly attaches to the rule on which we are commenting, may be gathered from some of the results by which the judgment was attended. In the first place it determined the relative position of the litigants as pursuer and defender. Then, as a consequence of this, the *onus probandi* fell upon the party who had been defeated in the preliminary question. Whatever the right of the temporary possessor might be, his claim was absolute to hold the subject, as the prætor had decreed, till a better title had been *proved* by the person who maintained it. If such evidence was not forthcoming, the temporary possession was declared final, and, in all cases of doubt, the presumption of law was on the side of the defender. Now we are in a position to comprehend the full import of this rule. What was a mere commonplace when measured by the standard of popular intelligence, becomes the expression of an important principle of law when viewed by the fuller light of science and of knowledge. But while the use which Professor Bell makes of the rule gives us no adequate idea of its meaning, the law of Scotland abounds with illustrations of it, which meet us at every turn. Upon the general principle which lies at the bottom of it, depends the well-known presumption of our law in regard to movables, that possession is always a *primâ facie* title to property. In a certain sense, indeed, this rule has a wider operation with us than even among the Romans. In Scotland, irrespective altogether of the manner in which it is acquired, possession of itself constitutes a right,—short-lived it may be in some cases, only nominal in others,—but always amounting to an exemption from the *onus probandi*, the burden imposed upon the party who seeks to be restored. But the Roman law, always going a step beyond us in its subtle distinctions, was very far from acknowledging every manner of possession. If even the rightful owner had obtained possession by violence or fraud, he was not allowed to reap the benefit of his tortious act; he was, on the contrary, obliged to reponé the person whom he had displaced before the law undertook to examine the question of right.

So clearly does it appear that the doctrine of possession plays an important part in the relations of the two systems. In further illustration of it as an independent principle of law, and, if we may so speak, as exhibiting the obligations which, as in other legal conditions, form the counterpart of rights, we notice the rule,—

“ *Qui dolo desierit possidere pro possi dente  
Damnatur quia pro possessione dolo est.*”

He who has fraudulently got rid of his possession is condemned as if he were in possession, because his fraud is equivalent to possession.

This rule might be adduced as readily as any other in evidence of the repugnance which is every where manifested in the Roman law for fraud in all its forms. It illustrates, however, at the same time, a principle in reference to possession which runs throughout the writings of the civilians, and has also passed into our law; and we

notice it here as giving some sort of completeness to our brief statement of the general doctrine. The meaning of the rule is sufficiently obvious,—that a person abandoning his possession with the view of evading a legal claim is to be treated, so far as his liabilities are concerned, in the same manner as if he still continued in possession. We learn from the edict, “*de nozalibus actionibus*,” that it was originally applied to the case where a master, pursued for the damage caused by his slave, had fraudulently got rid of him in the hope of obviating the demand. Numerous other illustrations of it are scattered through the Pandects. Thus, the robbers of an inheritance, *prædones*, as they were technically called, were prosecuted on the ground of the possession which they had forcibly attained, although, before the time of *litis contestatio*, they had abandoned the effects. The illustration which most readily suggests itself in the law of Scotland, is the doctrine of *rei vindicatio*. This is the action by means of which the proprietor of a thing may proceed summarily against any person in whose possession he may find it. In strict law, it is necessary with us, as with the Romans, that the party sued should actually be in possession. But the civil law recognised the principle of a *fictus possessor*, and our action of restitution may similarly proceed against one who, having been in possession, has fraudulently relinquished it.

The preceding observations, it is hoped, will serve as an example of the general plan which we propose to follow in connection with these maxims. Some of these are, individually, of importance, as expressing the substance of principles great and comprehensive. Others will claim our attention as integral parts of a group or series, all tending to illustrate one general doctrine. In our next number, we shall enter upon the consideration of those which bear upon the subjects of *dolus*, *culpa*, and *mora*. Throughout the civil law, these principles are continually recurring in the form of exceptions or limitations to the *jus Quiritium*; and in one branch of our municipal law, the great common law department of obligations, they are of the highest practical value and significance. W. A. B.

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#### PROPOSED LEGISLATION RESPECTING THE ABOLITION OF TOLLS ON ROADS.

THE “Report of the Commissioners for inquiring into matters relating to public roads in Scotland,” has attracted much attention, and deservedly met with no small measure of praise, both as respects the collection of the valuable mass of facts which it embodies, and the remedies suggested for our defective legislation respecting the maintenance of roads. On the more general questions involved in the inquiry we do not propose to enter, as they more properly belong to the domain of political economy than to the province of juris-

prudence; but we propose to avail ourselves of the valuable information afforded by the report on the more strictly legal bearings of the question. The report, including its tabular views, occupies nearly 300 pages; and the second volume, containing the evidence condensed in the form of declarations by the different witnesses, occupies 776 pages. The Commissioners were, William Smythe of Methven, Esq.; the Right Honourable Sir John M'Neill; Sir James Ferguson, Bart.; Sir Andrew Orr; and Duncan M'Laren, Esq. They were appointed, in terms of the Commission, to inquire (1) how far it might be desirable to institute an equitable system of assessment for the maintenance of roads in lieu of tolls; and (2) whether any changes could with advantage be introduced into the present system of management, supposing that tolls were not abolished?

The terms of the Royal Commission naturally led to an inquiry respecting the mileage of the public roads; their present mode of management; and their financial condition respecting revenue, expenditure, and debt. The roads have been divided, for the purposes of the inquiry, "into three classes, viz. (1), statute labour roads, called also commutation or parish roads; (2) turnpike roads; and (3) public roads which do not fall under either of these heads." The earliest Act on the subject of roads in Scotland was passed in 1617. It gave power to the Justices of the Peace to maintain roads to or from any market town or seaport, and to punish persons who injured the roads. It prescribed 20 feet as the minimum breadth for highways into market towns. It authorized the Justices to report to the Privy Council cases in which they considered new roads were required. This Act was renewed after the Restoration, in 1661, in the same terms, and continued to be the only statute law on the subject till the passing of the Act of 1669, cap. 16, which, for the first time, introduced personal service, and hence the name of *statute labour*.

This Act requires the Sheriff and Justices to meet yearly, and to provide for all "highways, bridges, and ferries within their bounds," to appoint overseers, having power to call on all tenants, cottars, and servants, "by intimation at the parish kirk," to convene for repairing the highways, and to name special overseers to direct the work. These overseers were to receive wages; and the Act provided that no man or horse was to be obliged to labour on the roads for more than six days, during each of the first three years after the passing of the Act, nor for more than four days in any future year. It is not so generally known as it ought to be, that this Act did not impose the whole burden of maintaining the roads on the tenants and labourers. Although they were obliged to give their personal service for a few days, which was then of very small pecuniary value, the heritors were obliged to contribute of their substance. The Act provides that, "because the work of the inhabitants within the several bounds will not be able sufficiently to repair the highways and others

aforesaid, the freeholders and heritors are to "stent" or "tax *the heritors of the shire*, comprehending the heritors of the burgh lands therein (i.e., lands in counties belonging in property to royal burghs), in *what shall be found necessary* for the effect foreshaid, not exceeding *ten shillings Scots upon each hundred pounds* of valued rent in one year." The Act likewise authorizes the levying of customs at bridges, causeways, and ferries, when the "stent" is insufficient. The Commissioners correctly state that this statute is still subsisting, although it has been generally superseded by local Acts, except in Bute and Shetland.

It is plain from this Act that the heritors were as much bound to maintain the roads as were the tenants and labourers; and hence that the recommendation of the Commissioners to abolish all tolls, and to maintain the roads by means of a direct assessment upon all heritable property, of which one half shall be paid by the owners, and the other half by the occupiers, is merely a recommendation to return to the ancient statute law of Scotland embodied in this Act; for an assessment on the heritors of ten shillings Scots on every hundred pounds Scots of valued rent in those days, would, in all probability, be quite equal to the then money value of six days' labour of all the tenants and cottars on their estates. The value of a day's labour in 1669 was incredibly small; and the valued rent, referred to in the Act, was at that period nearly the same as the real rent.

The Commissioners in their report very clearly point out the great difference which exists between the law of Scotland, as flowing from this statute, and the law of England. In Scotland no obligations exist to maintain roads other than those imposed by statute; and, therefore, when statutory funds become insufficient for that purpose, there is no remedy. In England, on the other hand, the parishes are bound at common law to maintain all roads out of parish rates; and all other statutory provisions for that purpose are held to be merely in supplement of this primary provision and obligation. When any such special provision, therefore, comes to an end, as, for example, on the expiration of a local Act imposing tolls or other rates, during a limited number of years, the original obligation resting on the parish comes into renewed existence, and any person having an interest can compel the parish to repair and maintain any such road out of local rates levied for such purposes.

No material alteration on the provisions of the Act of 1669 was made by any general statute till the passing of the Act 8 and 9 Vict., cap. 41; and that Act contains certain general provisions which are required to be incorporated with all local Acts. By this Act of 1845, all occupancies under L.2 of rent are exempted from taxation; and the trustees have power to exempt all under L.5 when they shall think fit to exercise this power.

The rapid increase of population and wealth in Scotland, which followed the union with England, led to the desire for new lines of road for which the Act of 1669 did not make any provision;



and these demands, for the first time, led to the system of turnpike roads upheld by tolls. The earliest of these Acts was one passed in the 12th year of Queen Anne, entitled "An Act for upholding and repairing the Bridges and Highways in the County of Edinburgh," which was to endure for fifty years. It authorized toll-bars to be placed "in, or cross, any part or parts of the said highways or roads, and to receive and take for every horse with a load, passing each and every time through the said county to the said city, the sum of *one sixth part of a penny sterling*; and for every cart, waggon, or sledge passing, laden or unladen, each and every time, through the said county to the said city, the sum of *one halfpenny sterling*." This was the origin of our system of taxation by means of tolls; and, it will be observed, they were only in supplement of the assessments formerly imposed on the heritors, and of the statute labour imposed on the tenants and labourers. The Act proceeds on the common-sense principle, that the producers in the county, having to bring their produce to the city for sale, had the greatest interest in the maintenance of good roads; and the tolls were, in consequence, specially directed to be paid by them every time they passed "through the said county to the said city." The citizens going *from* the city to the county do not appear to have been made liable in payment of tolls by this Act. This view is confirmed by a proviso also quoted by the Commissioners (although they do not draw any inference from it) to the effect, that nothing in this Act "shall be construed to extend, to charge any person or persons *riding through the said county, or going in a coach, chariot, or chaise*." In short, the tolls were authorized only to be levied on loaded vehicles coming to the city with produce for sale; and the landowners, coalowners, and farmers were thus made the payers of the tolls in the first instance, wherever the incidence of the taxation might ultimately rest.

The amount of the tolls leviable under this Act is worthy of notice: only one halfpenny for a loaded cart or waggon. This rate has now been increased to threepence as a minimum, but fourpence and sixpence are frequently charged. The rate has thus been increased, on an average, at least eightfold; and it has very properly been extended to all vehicles going *from* the city. Now, while this increase on tolls has been going on, it may be asked to what extent has the assessment on land been increased? The answer is, that the owners of the land being the law makers, and the law administrators, they acted, as all class interests in their peculiar position do, when they have the power; they *diminished* their own burdens, while they greatly increased the burdens of other classes. The assessment of ten shillings Scots has, only in a few cases, been maintained, and levied under the name of "Bridge Money;" but no other valuation for that purpose having been made since the passing of the Act of 1669, the assessment has, through the great increase in rents, virtually *fallen* to one-tenth part of the amount intended by Parliament, although the taxation from tolls has, during the same period, been

*increased* to eight times the amount fixed by Parliament under the Act of Queen Anne. A landowner who, at the percentage fixed in 1669, should now pay L.10 of direct assessment, thus pays only L.1; and a farmer or trader who, by the Act of Queen Anne, would have had to pay L.1 of tolls, has now to pay L.8; so that, by the operation of these causes, the burden has been almost entirely removed from land, in any direct form, and has been imposed on the farming and trading interests of the country, these being the great *users* of roads; although, as is well known, the making and maintenance of good roads has greatly increased the value of all lands.

Those roads which are neither turnpike nor statute labour are next noticed by the Commissioners. They are chiefly old military roads, and Parliamentary roads; but they do not require any special notice from us, as they do not possess any interest in a legal point of view.

The plan which the Commissioners propose is exceedingly simple, and appears to be equally just to all parties. They recommend that the existing debts should all be valued, and that the ascertained real value should be imposed as a burden on all heritable property, and to be spread over such a series of years as may be thought most expedient. After this shall have been done, they recommend that all roads, without exception, should be maintained by county boards, from a direct assessment, one half of which is to be paid by the owners, and the other half by the occupiers of all heritable property within the county. Where leases exist, they recommend that the tenant shall pay the whole assessment during the currency of the lease; and that all Parliamentary burghs shall either maintain the whole roads within their limits, by means of a separate burgh assessment, or, in their option, become part of the county trust, and pay an equal share of the county assessment, in which case their roads and streets, so far as they are now maintained from any public fund, should thereafter be maintained from the funds of the county board. The Commissioners do not object to an assessment on horses, provided not more than one half of the sum required is levied in that form; and provided that agricultural horses are charged only one half of the rates charged on all other horses. The amount of the new assessment required in lieu of the present tolls and of the statute labour and bridge money rates, is so small that the burden would be very little felt. Taking six of the largest counties in Scotland, and assuming that the burghs maintained their own roads, and that no tax is laid on horses, the new assessments would be, for the county of Edinburgh, 7½d. per pound; Lanark, 7d.; Ayr, 5½d.; Perth, 6d.; Aberdeen, 4½d.; Fife, 5½d. Of these sums the owners would have to pay only one-half, and the occupants the other half; and as the Commissioners recommend the abolition of all customs, through-tolls, and canseway mail, now charged on goods and cattle passing through burghs, this would be an additional relief to the

counties, although in an indirect form. It is stated in a note to this table (p. 67), that the "causeway mail" payable in Edinburgh, on goods and produce brought into the city, is about L.1500 a-year. The effect of abolishing this tax would therefore be equal to nearly one penny per pound on the county rental; so that the new assessment, accompanied by the abolition of the causeway mail, would make the real burden to be imposed on the county only about 6½d. per pound, in lieu of the present burdens. In such circumstances we cannot doubt that the recommendations contained in the report will be very generally approved of, and soon receive the sanction of Parliament. Our readers will be glad to learn that the Commissioners pay a well-merited tribute to the exertions of Mr Pagan, a member of the legal profession, and the well-known pioneer of road reform in Scotland.

#### PRIVILEGE OF THE CONFESSIONAL.

*(From the Solicitors' Journal.)*

A FEW days ago, in a case before Mr Justice Hill, on the Northern Circuit, a question was raised, which has never yet been conclusively decided in modern English law. In the trial of a man who was indicted for highway robbery, a Roman Catholic priest, who gave part of the stolen property to a policeman the day after the robbery, was called on behalf of the prosecution, but refused to take an oath which required him to state the whole truth, upon the ground that the property had come into his possession in the course of the exercise of his duties in the confessional. The learned judge declared that the law would not protect any clergyman who had received stolen property from disclosing from whom such property had come to him. Mr Kelly, the clergyman, having subsequently taken the oath, declined to answer a question, upon the ground that he could not do so without disclosing information which he had received in a confessional; and thereupon he was committed to prison, but was immediately afterwards liberated. The case has been the subject of a conversation in the House of Commons, in which Mr George Bowyer has asserted, that by the old common law of England the seal of confession constituted a privilege; and he insisted that such a privilege was, at least, of as high a nature as that which was conferred upon communications between an attorney and his client. Sir G. C. Lewis denied that the law of England privileged a priest from answering a question as to communications made to him in confession; or that such privilege existed with respect to a clergyman of any denomination, or a physician. Sir F. Kelly stated that it had been established, by a decision of the Exchequer Chamber, that communications made in confession were not privileged. We have been unable to discover any such decision, although we have searched for it. These conflicting statements as to what English law upon this question really is, are but a reflection of the contradictions to be found in the authorities relating to it. There have been some decisions almost as explicitly in favour of Mr Bowyer's contention as to warrant the proposition which he made to the House; while there are upon the other side decisions laying down a contrary rule. It has long been an established principle of our law, that a coerced confession should be rejected; as should also any confession which has been obtained by any inducement held out to the accused by any one having lawful authority over the person of the prisoner. But it has been expressly held that where the inducement is merely of a spiritual character, the rule does not apply. In the case of *Rex v. Richard Gilham*, 1 Moody, C. C. Res. 186, it was held that a confession made in consequence of persuasion by a clergyman, not

with any view of temporal benefit, is admissible evidence. There, the clergyman was chaplain of the jail where the prisoner, who was indicted for murder, had been confined, and the prisoner had made to the chaplain various confessions in relation to his alleged offence, which Mr Justice Littledale at the trial received as evidence, and his ruling was unanimously affirmed by all the judges, who were present in the Court of Crown Cases Reserved, where the question was discussed. The argument in that case contains a summary of nearly the whole of English law upon the subject; and in Mr Best's very learned and philosophical treatment on the principles of evidence, all the authorities which were in existence when that work was written are fully considered (Best's *Principles of Evidence*, pp. 629 and 690). The arguments, however, in *Rex v. Gilham* and Mr Best's treatise, only go to prove that the question under consideration is left to be answered by every judge very much after his own inclination. When the case of *Rex v. Gilham* was once mentioned in an argument before Lord Tenterden, he alluded to the fact that it decided such a communication between a prisoner and a clergyman was not privileged; but he added, "I for one will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence." Again, no longer ago than 1853, in the case of *Regina v. Griffin*, which was tried at the Central Criminal Court, Mr Baron Alderson expressed his opinion that conversations between the chaplain of a workhouse, acting in the exercise of a spiritual capacity, and the prisoner, a woman who was charged with murder, ought not to be given in evidence. His Lordship added, "The principle on which an attorney is prevented from divulging what passes with his client is, that because without such an unfettered means of communication the client could not have proper legal assistance; and he added, the same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance." He subsequently, however, took occasion to observe that he did not lay this down as an absolute rule. This case is, at all events, some justification for Mr Bowyer's statement in the House of Commons, as to the analogy of the privilege existing in the case of a legal adviser and his client. As to what he said about the "old common law," there are many observations upon that subject which are much more easily made than disproved. But whatever the old common law may have been, there is no doubt that, previous to the Reformation, statements made to a priest under the seal of confession were privileged from disclosure. According to the law of the State of New York, no clergyman of any denomination is permitted to disclose a confession made to him in his spiritual capacity. We believe that a similar rule has been adopted by other States of the Union, and it is, of course, generally recognised in countries where the Roman Catholic religion is established. It requires a little reflection to arrive at a conclusion, that whatever may be the ultimate decision on this question of our Courts, or of the Legislature, it must apply equally to clergymen of all denominations.

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## THE MONTH.

Summary Petitions—Printing Records in the Outer House—Jury Trial Sittings—Law of Marriage—Titles to Land Amendment Bill—Bankruptcy Amendment Bill—Scotch Reform Bill.

THOUGH our efforts for the reformation of Court of Session procedure have not led to any practical result, it is at least encouraging to observe the disposition which exists in various quarters to recognise the need of improvement, and to contribute towards the relief of the suitor in such lesser points as lie within the sphere of

individual action. We have noticed elsewhere the movement originated by the Faculty of Advocates for the establishment of a summary process of appeal in Sheriff Court cases. A question of some practical importance connected with Outer House practice has lately been discussed in the Society of Writers to the Signet. Most of our readers will be aware that, in a department of the Court of Session now become of considerable importance, the Court of the Lord Ordinary on Petitions, a great proportion of the actual business of the Court is transacted in private. It has always been the practice, where any inquiry was necessary in this class of applications, for the Lord Ordinary to remit to some practising agent to inquire into the facts alleged in the petition, and report as to the petitioner's compliance with the statutory forms. This is a duty involving considerable labour and responsibility; for although the ultimate decision, whether in regard to matters of principle or of practice, rests with the Lord Ordinary, yet, practically, he is dependent on the reporter for his information; for no judge could be expected, even if he had the time, to go into a personal investigation of the details of title-deeds and account-books. The reporters on petitions are remunerated by fees at the expense of the applicants; and we understand that the appointment is so far a lucrative one, as to be an object of ambition to men of considerable position in the profession. It has recently been proposed, however, that an additional Clerk of Court should be appointed, who should be bound to undertake the duty of making such investigations; and it has been thought that these duties, if attached to a permanent office, would be better performed than when left to persons selected at the discretion of the Junior Lord Ordinary for the time. We very much doubt whether the change would be attended with any material benefit to the suitor; nor have we ever heard the least complaint respecting the working of the present system. If there is to be a permanent appointment—as to which we do not say that any fair objection can be taken—he ought to be paid, as heretofore, by fees, and not at the expense of the general public, who derive no benefit from inquiries relating to entail improvements, or to the titles to family property. The rule is at present universal, that the proof of matters of fact must be at the expense of the parties to the litigation. If the inquiry is before a jury, the parties must pay the jurymen for their time; and if it is before a commissioner, that functionary must be fee'd for his trouble. There is no good reason

for making an exception in the case of *ex parte* inquiries under summary petitions.

We may also take this opportunity of calling attention to an excellent practical suggestion, for which we understand the public are indebted to Lord Kinloch, that Records should invariably be printed in the Outer House. The advantages of print, and the saving of time and eyesight which it ensures, can only be appreciated by those who have to sit late at night poring over manuscript papers. Print is moreover recommended by its immeasurable superiority for purposes of reference at debate. Many a client, if he only knew it, has been in a fair way of losing his case, because his counsel has been unable, on a sudden exigency, to lay his finger on some averment which he knew to be in the paper, but which was about as easy to discover in the chaos of a manuscript record, as it is to find a needle in a truss of hay. We trust the other judges of the Outer House will see the propriety of following the precedent set by Lord Kinloch, and insist that all records must be printed. The statute gives the judge full power to print if he deems it expedient; and there can be no doubt that it is expedient in every case. Even in the lowest point of view,—the economical—the advantage is on the side of printing, as the following estimate, obtained from a first-class printing establishment, will show:—

NOTE OF RELATIVE EXPENSE OF PRINTING AND WRITING  
RECORDS.

	3 copies MS.	5 copies MS.	50 copies Print.
20 pages MS.	L.1 10 0	L.2 10 0	L.1 12 6
30 pages MS.	2 5 0	3 15 0	2 0 0
45 pages MS.	3 7 6	5 12 6	3 0 0
60 pages MS.	4 10 0	7 10 0	4 0 0
75 pages MS.	5 12 6	9 7 6	5 0 0
90 pages MS.	6 15 0	11 5 0	6 0 0
105 pages MS.	7 17 6	13 2 6	7 0 0

We do not of course overlook the loss to the agent from printing, who is thus deprived of his fees for copying the record. Yet, on the other hand, he is relieved from all anxiety about the expense of *reclaiming*; and if he takes the case to review, which he will do in nine cases out of ten, when the record has been previously printed, the original loss is more than compensated by additional session fees and other emoluments.

Another innovation of more questionable expediency is the system adopted by the Second Division at the March jury sittings, of

putting out all the cases for hearing on the same day. It may be admitted that there was room for improvement on the old method, which, though extremely convenient for leading counsel who may happen to be engaged in three-fourths of the cases on the roll, is neither satisfactory to the public nor fair to the presiding Judge. The new system has at least the merit of economising the time of the most important person in the Court; and has also, we understand, led to a slight extension of the select circle within which the jury practice of the bar has been generally confined. But litigants are apt to think that these benefits are too dearly purchased, if they are put to the expense of keeping their witnesses waiting a week in town until their case is ready. If the system of allotting a separate day to each trial is to be discontinued, it is at any rate desirable that advantage should be taken of the accommodation which the Parliament House affords for carrying on a considerable number of trials simultaneously; or else the jury business should be transferred to the Circuit, as it is in England, in which case an arrangement ought to be made by which the members of the bar would confine themselves to *one* circuit.

The recent decision of the First Division in *Leslie's Marriage* case naturally invites the inquiry, Why has the statutory provision for trying consistorial cases by jury been allowed to remain a dead letter? If the system of deciding cases on a written proof possesses any superiority over jury trial, it is this, that, under the former method, a well-considered code of *presumptiones juris* may be gradually built up, such as will enable the legal adviser to pronounce with something like certainty on the rights of parties, and thus to obviate the necessity of ruinous and distressing legal investigations. The case of *Leslie* afforded an excellent opportunity for "straightening the marches" in that debateable territory which separates concubinage from irregular marriage,—an opportunity which, we regret to say, the First Division has thrown away. Any one of the able and discriminating opinions delivered in that case might have been adopted without alteration, as a charge to a jury on the evidence; the differences in opinion amounting to no more than that gentle inclination to one side or the other, which is inevitable where different minds are brought to bear on a nicely balanced case. Yet, in such a case, something more might have been expected than a simple verdict *tota re perspecta*. There was abundant evidence of an acknowledgment of marriage in writing, and the doubt felt was

only as to the intention of the parties. What we desiderate in this decision, is a clear recognition of the principle, that the intention of the parties is to be presumed in the first instance from the acknowledgment itself, and that the *onus* of redarguing the presumption lies on the defender, in an action of declarator. In the present chaotic state of the law of marriage, rules of evidence must perforce supply the place of solemnities of execution ; and though, at the best, they form but an indifferent substitute, it is at least desirable that they should be sharply defined and inexorably maintained. Had the rule which we venture to suggest been adopted by the Court, it would not have made any difference in the actual decision of the case, but that decision would at least have been attained with less difficulty, and perhaps with the advantage of unanimity.

The Titles to Land Amendment Bill is the natural sequel to the legislation inaugurated by the Lord Justice-Clerk, its main object being to extend the provisions of the original enactment to lands held in burgage tenure. One or two blunders in the former Act are corrected, among others an important defect arising from the omission of the word "not," which we pointed out in 1858 in our commentaries on the Act. The Act of 1858 provided that the recording of a writ of resignation, along with the conveyance on which it was indorsed, *should* have the effect of sasine on the conveyance. As the record had also the effect of infeftment upon the writ itself, it is obvious that a mid-superiority would be created by registration ; and this result, which has prevented the use of the abridged forms in completing a title by resignation, will be corrected by the Lord Advocate's Bill, by the insertion of the negative particle in its proper place. We observe that the Lord Advocate has also inserted a clause on the suggestion of the Faculty of Advocates, to the effect that the omission of words importing *de præsenti* conveyance shall not invalidate a disposition. This change will doubtless be well received by the public ; and if it has the effect of encouraging unprofessional persons to write their own deeds, the lawyers have certainly no reason to complain.

While we gladly acknowledge the merits of Mr Moncreiff's measure, as another step in the path opened up by Sir Robert Peel's administration, we cannot forget that there is still much room for improvement. Having very recently indicated the conditions of a final and satisfactory solution of the feudal difficulty, we shall not again return to the subject. With reference to the thirty-second



clause of the new Bill, it has occurred to us that provision should be made for the adoption of an *adhesive stamp* for the duty exigible on writs now substituted for charters and other forms of investiture. Unless this is done, agents will be obliged to take every conveyance to the Stamp Office, and have it specially impressed with a denoting stamp before a writ can be indorsed upon it.

On the whole, the Bill is deserving of support, rather as an earnest of the good intentions of its promoter than for its own merits. The draftsman is evidently a mere mechanical copyist of the forms devised by Lord Rutherford for simplifying the transference of heritable securities. Where the artist has ventured on an original idea, his incompetence is so manifest, that we may be thankful he has adhered so closely to the old landmarks, though a bolder course would not have been received unfavourably by the profession. It is evident, at least, that whoever is dissatisfied, the draftsman is perfectly satisfied with himself, because he has repeated the blundered twenty-first clause of the original Act with scarcely a word of alteration, although its totally unworkable character was exposed in our pages so long ago as March 1859. Not only are we still left in doubt as to the particular class of judicial officers whose title is to be completed by the warrant of the Lord Ordinary; but in the only case in which it has been considered proper for the judicial officer to make up titles in his person, the clause is so framed as to be inapplicable to the circumstances. We allude to the appointment of a judicial factor to administer a lapsed trust. The bill provides that the Lord Ordinary's warrant shall have the effect of a disposition from the party whose estate is under management; but it is obvious to remark, that the whole difficulty in such cases arises from the fact that there is no party in a position to grant a dispositive. The description in the Bill is so conveniently indefinite, that it is impossible to guess whether the draftsman intended to point to the *truster*, the *trustee*, or the *beneficiary*, as the party whom he kindly undertakes to relieve of the trouble of executing a conveyance. The clause is equally unfortunate in its designation of the party in whose favour the imaginary disposition is supposed to be granted; because, in its most obvious meaning, it would imply that tutors-dative and curators bonis are to make up titles *in their own persons*, though we can scarcely believe that so important a change in the functions of a legal guardian was intended to be operated by this inferential sort of legislation.

We annex a form of a clause which, if substituted for the twenty-first clause of the original Act, would be effectual for completing the title to irredeemable property. A separate clause should be added, adapted to the case of heritable securities, and authorizing the registration of warrants in both cases in the Register of Sasines.

"Where a judicial factor, appointed by the Court of Session to administer the trust estate of any deceased person, shall apply by petition for authority to complete a title in his person to any lands (whether held by burgage tenure or by any other manner of holding), forming part of the trust estate under his management, such petition shall specify the lands to which a title is to be completed, and the name of the person who was last infeft in the lands; and shall also state whether the same have been specially disposed in the trust disposition or other deed, by which the trust estate shall have been created; and these particulars shall also be narrated in the warrant to be granted for completion of such title; and where the lands shall have been specially disposed as aforesaid, such warrant shall have the effect of a disposition of the lands in favour of such judicial factor from the trustee in whose favour infeftment shall have been taken; or, if infeftment shall not have been taken by the trustee, such judicial factor shall be in the same position as if the granter of the trust disposition or other deed of trust had executed a disposition in his favour of the subjects specially conveyed as aforesaid, subject to the conditions of the trust; provided always that nothing herein contained shall be applicable to petitions by any tutor-dative, factor loco tutoris or loco absentis, curator bonis, or by the manager of any burgh or other public corporation."

The Lord Advocate has also brought in a bill to regulate the jurisdictions of the English and Scotch Bankruptcy Courts, with the view of preventing the evasion of the diligence of creditors by English bankrupts who may acquire a temporary domicile in Scotland. The bill provides that *all* interlocutors of the Sheriff under that Act shall be subject to review by the Court of Session, without adverting to the limitation introduced by the last Act, which makes the Sheriff's deliverance relative to the appointment of a trustee final. We cannot see that any good result is likely to arise from innovation on this point, nor do we believe that any change was intended. But it would be desirable to alter the wording of the clause so as to remove any ambiguity that may be supposed to attach to it.

Two points occur to us as worthy of notice in the Registration clauses of the Scotch Reform Bill. The one relates to a question of principle, the other is a point of practice. It appears not to have been observed, that by making the Valuation Roll the Register for Parliamentary Elections, the lodger franchise, which has met with such general approval from all parties, will be actually repealed in those districts where it already exists. By the decisions of the Scotch Registration Courts, it has been established that a lodger occupying apartments of the value of L.10 per annum, unfurnished, is entitled to be put on the electoral roll, although he may not be liable for taxes in virtue of his occupation. It is true that this franchise was not very extensively claimed; but the want of it will be felt as a grievance, and we believe that the addition of a clause continuing this privilege would be received with satisfaction by a large and intelligent class, and would meet with no opposition from any quarter. The other point relates to the constitution of the new Registration Appeal Court. It is perhaps as well that these Courts should be removed to the capital; but in that event we would suggest that *any* two Lords Ordinary should constitute a Court, and that while the roll should be completed, as heretofore, prior to the period of the municipal elections in October, it should be competent notwithstanding to add to the roll the names of all persons found to be qualified by the Court at a meeting in November. This would at any rate secure the completion of the roll for the purpose of Parliamentary elections.

In our number for January last, we stated, on what we considered reliable authority, that the important office of Chief-Justice of Ceylon was placed at the disposal of the Lord Advocate of Scotland. This information, we now believe, was not strictly accurate; as, soon after the vacancy occurred, the appointment had been offered to Mr E. S. Creasy of Lincoln's Inn, a gentleman of high standing and accomplishments. Had this not been the case, we have reason to believe that the claims of the Scottish Bar would have been recognized by Government. We believe the Lord Advocate did everything in his power to support the claims of our Bar. Accordingly, when another colonial appointment of a similar nature became vacant, it was offered to the gentleman to whom rumour had assigned the Ceylon vacancy, and declined. We consider that the Bar of Scotland are much indebted to the Lord Advocate.

## Legal Intelligence.

**THE BAR.**—The following gentlemen were called to the Bar on the 20th March,—viz., Mr James Tod, Mr Stair Andrew Agnew, and Mr James Dingwall Fordyce.

**Box-Days.**—The Lords have appointed Wednesday, 18th April, and Wednesday, 2d May, to be the Box-Days in the ensuing Vacation.

**BILL CHAMBER.**—The following is the rotation of Judges for the Bill Chamber during the Spring Vacation :—

21st March to 24th March, . . . . .	Lord Curriehill.
26th March to 7th April, . . . . .	Lord Benholme.
9th April to 21st April, . . . . .	Lord Mackenzie.
23d April to 5th May, . . . . .	Lord Kinloch.
7th May to meeting of Court, . . . . .	Lord Jerviswoode.

### CIRCUIT APPOINTMENTS FOR SPRING VACATION, 1860.

*West.*—LORDS JUSTICE-CLERK and COWAN.

*Stirling*—Thursday, 12th April. *Inverary*—Wednesday, 18th April. *Glasgow*—Monday, 23d April, at 12 noon.

DAVID HECTOR, Esq., *Advocate-Depute*. DAVID WYLIE, *Clerk*.

*South.*—LORDS IVORY and ARDMILLAN.

*Jedburgh*—Friday, 13th April. *Dumfries*—Tuesday, 17th April. *Ayr*—Friday, 20th April.

WILLIAM IVORY, Esq., *Advocate-Depute*. ALEXANDER STUART, *Clerk*.

*North.*—LORDS DEAS and NEAVES.

*Perth*—Tuesday, 10th April. *Aberdeen*—Tuesday, 17th April. *Inverness*—Friday, 20th April.

F. L. M. HERIOT, Esq., *Advocate-Depute*. JAMES AITKEN, *Clerk*.

**LEGAL APPOINTMENTS.**—The Queen has been pleased to appoint Edward S. Creasy, Esq., to be Chief-Justice of Ceylon. Mr A. B. Shand, Advocate, has been deputed by the Lord Advocate and the Lords Justices for Scotland to inquire into the state of the Sheriff Court business in Dundee. Mr Shand has already commenced to take evidence on the subject.

**REGISTRATION OF VOTERS.**—The report of the committee of the Faculty of Advocates, and resolution of the Faculty thereon, as to the Appeal Court in reference to the registration of voters provided by the new Reform Bill for Scotland, has just been published. The report recognises the necessity of a central court of appeal, but considers that such a court should discharge its duties openly, as other courts of justice do, and after hearing parties, that public confidence might be secured to it. The committee are also of opinion that it would be inexpedient to allow an appeal to either of the Divisions of the Court—these being already overburdened with work—and see no reason for selecting the senior Lord Ordinary and the Lord Ordinary in Exchequer causes, the illness or absence of one of whom would bring the business to a stand, while, on the occasion of the next vacancy, the same judge (Lord Ardmillan) would be both senior Lord Ordinary and Lord Ordinary in Exchequer. The committee consider that the Court of Appeal should consist of any two Lords Ordinary, with power to call in a third in case of difference of opinion, the duties being undertaken by the judges in rotation. They also object to the option left with the Sheriff of refusing a special decision in a case if he be of opinion that it is frivolous,—an opinion in which the Court of Appeal might not concur, but which could not under the Act be brought under review. They also object to the Sheriff being empowered to declare any two cases identical, as proposed by the bill, and they recommend that the five Lords Ordinary be empowered to pass rules for regulating the details of proceed-

ings in the Appeal Court. At a meeting of the Faculty on 17th March, the report was adopted. It was also directed that it should be printed, and copies sent to the Lord Advocate and such other members of Parliament as the committee think proper.

**THE BARONY OF BROUGHAM.**—The Queen has been pleased to extend the title of Lord Brougham and Vaux, hitherto limited to the present peer, to his surviving brother, Mr William Brougham, and to his male heirs. This act of the Sovereign will be appreciated by the public as a just tribute to the genius and public services of the veteran Henry Brougham. Mr William Brougham was formerly a Master in Chancery, and sat as M.P. for Southwark in 1831–34. He is the youngest and (with exception of Lord Brougham) the only surviving son of the late Henry Brougham, Esq., of Brougham Hall, and was born about 1786.

**DEATH OF BARON WATSON.**—Immediately after charging the grand jury at the assizes for the county of Montgomery (held at Welshpool on the 13th inst.), Baron Watson, who had been for some weeks in ill health, was observed to put his handkerchief to his face, and a smelling bottle to his nose. He leant back in his chair, and it was evident that something more than a fainting fit had seized him. Several medical men were immediately in attendance, and every means were resorted to that medical skill could devise; but he grew gradually worse, and, a sofa cushion having been procured, he was laid upon it and conveyed to his lodgings, which were close at hand. He had scarcely reached them when he breathed his last.—*Law Times*.

**BANKRUPT LAW (SCOTLAND) AMENDMENT.**—*To Amend the Bankruptcy (Scotland) Act 1856.*—This Act may be cited as “The Bankruptcy (Scotland) Amendment Act 1860 :” (1.) Where it shall appear to the Court of Session or to the Lord Ordinary, upon a summary petition by the accountant in bankruptcy, or any creditor or person interested, presented within three months after the date of a sequestration that has been or shall be awarded in Scotland, that a majority of the creditors in number and value reside in England or Ireland, and that, from the situation of the bankrupt's property or other causes, his estate ought to be distributed under the laws of England or Ireland, the sequestration may be recalled, or a judgment pronounced, that the bankrupt shall not be entitled to a discharge, but only to a decree of *cessio bonorum*; which decree may be granted in the sequestration without a separate process. The application for discharge may be refused, although two years have elapsed from the date of the sequestration, and no appearance or opposition be made on the part of the creditors, if it appear from the accountant's report or other evidence that the bankrupt has fraudulently concealed any of his estate, or wilfully failed to comply with the Act of 1856 : (2, 3.) Interlocutors under this Act are to be subject to review by the Court of Session : (4.) The Act of 1856 shall be construed with this Act : (5.)

## Digest of Decisions.

### COURT OF SESSION.

#### FIRST DIVISION.

**DAWSON'S TRUSTEES AND OTHERS v. M'LEANS.**—Feb. 3.

*Jurisdiction—Lis Alibi—Forum Competens—Interdict.*

The object of this application for interdict is to prevent the respondents, Colonel and Mrs M'Lean, of Lazenby Hall, near Penrith, from

proceeding in Chancery to set aside a sale of ten shares of the Carron Company to the late Joseph Dawson. Mrs M'Lean held twenty shares of the Carron Company, and she sold ten of them to Joseph Dawson, the leading partner and manager of the Carron Company, and the other ten to his brother William (one of his trustees), who was also a partner and the managing clerk. Joseph died in 1850, leaving a settlement, whereby he left seventy Carron Company shares to his brothers William, Thomas, and Henry, and appointed them his trustees and executors, as also residuary legatees. Henry resided and was domiciled in England, and Thomas and William in Scotland. On the 3d February 1859, the respondents filed a bill in Chancery against William, Henry, and Thomas Dawson, and the Carron Company, on the representation that the sale was procured by fraudulently misrepresenting the value of the shares through concealing the true state of the Carron Company's affairs, and keeping false books and accounts, so that the apparent value of the shares was under the real value. One of the Dawsons lives in England; the two others in Scotland. The bill seeks to have Mrs M'Lean's ten shares restored to her, and is directed against the Dawsons, both as trustees and as individuals. An order for service was made on 14th February, and on 19th February all three appeared conditionally, refusing to submit to the jurisdiction of the Court of Chancery; but eventually the jurisdiction of the Court of Chancery was sustained. On the 20th February 1859, the Dawsons, as trustees and executors of Joseph Dawson, raised a multiplepinding and exoneration in this Court, setting forth, *inter alia*, the claims of the M'Leans and others, which, if sustained, they say would exhaust the whole estate. In May 1859, the usual interlocutor, finding them liable in once and single payment, was pronounced, and a condescendence of the fund *in medio* was lodged. On 3d June, the respondents lodged a claim in this multiplepinding for the ten shares sold by them to Joseph Dawson. On 24th May, the respondents raised an action of reduction against Joseph Dawson's trustees, against William as an individual, and against the Carron Company, concluding for reduction of the sale of the ten shares to Joseph, and of the ten shares to William, and for an accounting on the proceeds of these shares on the same ground of fraud. The Lord President narrated these circumstances, and observed that the application was of an unusual character. It was to interdict the respondent from proceeding in the Court of Chancery in reference to the ten shares sold to William; and in support of the application it had been urged, that this is a Scotch executry, that the company into which the respondents seek to be restored is a Scotch company, that the multiplepinding is a process in which the whole can be tried, that it is a matter of convenience and justice that the proceeding should be limited to this Court, and that the pursuers should not be subjected to double proceedings in reference to the same thing. On the other hand, the respondents say that they are English parties, domiciled in England; that they are proceeding competently against Henry Dawson, who is domiciled in England; that the proceedings in the English Court of Chancery were prior to those in this Court; and that in the action of reduction they do not insist for the ten shares which is the subject of the bill in Chancery. On the general matter of competency he had no doubt, and he did not think that the mere fact of the party being

furth of the country excluded the jurisdiction of the Court to grant an application of the kind sought. The respondents were here in proceedings; and if in the course of these, it appeared that to allow other proceedings in the Court of another country would be to suffer injustice, or to cause embarrassment or oppression, it would be within the discretion of the Court of this country to interdict the proceedings in the foreign Court. But it was a very delicate matter, and the Court must be slow to interfere. If, however, such an interdict were granted, and the party were, in contempt of this Court, to go on in the face of it, and obtain a judgment in the foreign Court, it would be for this Court to consider whether a judgment so obtained should receive that effect which it was in use to give to foreign decrees obtained *in foro contentioso*. As to the competency and the jurisdiction he had no doubt; but he did not think, in the present case and in present circumstances, the Court ought to interfere in this case. The priority of the English proceedings was a matter of great importance, though by itself it was not conclusive. Then there are personal conclusions in the English action against Henry Dawson, and the parties might have advantages in the English proceeding which they might not have here. He was not satisfied that the proceedings in Chancery applied to the same matter as the proceedings here, and at present he was somewhat in the dark as to the nature of the proceedings. It might be shown hereafter that the proceedings in Chancery were the same as those here, and he was of opinion that the Lord Ordinary had acted rightly in passing the note and refusing interim interdict. The others concurred.

STEWART v. STEWART'S TRUSTEES.—Feb. 3.

*Deed—Deathbed—Revocation.*

The pursuer, James Stewart, slater and plasterer in Glasgow, eldest lawful son of the deceased James Stewart, seeks, on the head of death-bed, to reduce a codicil executed by his father on 4th May 1857, ten days before his death, in so far as it deprives him of heritage. The defenders plead that the fifth purpose of the trust-deed itself disposes of the residue of the heritage, and that the codicil merely makes an alteration in the distribution of the residue. The Court *held*, adhering to Lord Neaves' interlocutor, that the trust-deed did not dispose of the heritage, and that *quoad* the heritage the truster had died intestate; and also that, even if it had, the trust-deed had been revoked by the codicil executed on death-bed, which, though ineffectual as a conveyance, was effectual as a revocation.

MAIR v. SIR W. MILLER.—Feb. 3.

*Lease—Standard Weights—Illegality.*

The proprietor of Glenlee seeks to sequester one of his tenants, James Mair, tenant of Stairhill, for his rent. The tenant's defence is, that his rent has not been ascertained, as he is entitled to a deduction in his rent when the price of cheese is under the value of 10s. 6d. per stone, according to the fiars' prices. He alleges that the stone mentioned in his lease is fixed by 5 and 6 Will. IV., c. 63, at 14 lb., and that the price of that stone has been under 10s. 6d., or is at least not ascertained. The

landlord, Sir W. Miller, maintains that the stone meant by the parties, and acted on since the beginning of the lease in 1844, is the tron stone of 24 lb., which alone is used in Ayrshire. The Sheriff, after allowing investigation as to the usage, decided against the tenant. The argument in support of the note of advocacy was simply that the statute of William IV. enacted that the word "stone," standing by itself without qualifying terms, shall mean a weight of 14 lb. The Lord President said that he thought the statute not applicable to this case, for it is not a case of dealing in cheese. It might be a more difficult case if it were that put by Lord Ivory, that the cheese was to be given in kind; but here there is no cheese to pass between the parties, the rent is to be paid in money. There can be no doubt, on looking at the clause, what the meaning of parties was. The price of cheese is stated in it as to be upheld at 10s. 6d. a stone, which is a price that the imperial stone never attains; so that to suppose they meant any other stone than the understood stone of 24 lb., would be to suppose that they entered into an absurdity; and unless the words of the statute were so strong as to compel us to do injustice, he should not hold that the word stone could not mean any other weight than 14 lb. Lord Ivory was happy to concur. If the tenant could have insisted for his pound of flesh without his jot of blood, he should have found a way out of it by holding that he could not obtain any deduction in his money rent when the price of cheese was low, unless he could show what the fiars' prices of cheese were, which he could not, as there are no fiars for cheese in Ayrshire. The statute was not meant to supersede the dictionary, and explain the only possible meaning of a "stone." Lords Curriehill and Deas concurred; the latter remarking that the tenant could have no deduction in his rent until he established either the fiars' price of cheese or its market price, but there being no fiars, the market price in Ayrshire could only be the price at which the only stone—the tron stone—by which cheese is sold in that county.

THOMSON OR DONALD v. DONALD.—*Feb. 4.*

*Aliment—Process.*

This was an action for aliment, at the instance of a wife against her husband. The record had been made up in the Outer House, before Lord Ardmillan, in conformity with what has been the practice for some time in such cases. But the Court to-day held that this practice was erroneous, and that the Lord Ordinary should have made great avizandum at the first calling of the cause. Of consent of parties, the record made up in the Outer House was held to be the record in the action; but it was observed that in future cases of the kind the mode of procedure must be different.

HAY v. CARSE.—*Feb. 13.*

*Poor Law—Settlement—Husband and Wife.*

In this case, the pauper was a woman whose husband died possessed of a residential settlement. She then left the parish, and was absent for more than four years without acquiring another settlement. Which parish was bound to maintain her? Recourse against the residential settlement of her husband was lost by absence. Did she fall upon the parish of her husband's birth or the parish of her own birth? *Seven*



judges decided that the parish liable was the one in which she was born; *sic* held that it was the one in which her husband was born.

SIR W. D. STEWART, ETC., v. DUKE OF MONTROSE.—*Feb. 15.*

*Superior and Vassal — Charter — Clause of Relief — Teind Duties.*

By disposition of date November 11, 1853, the pursuer, Sir William Drummond Stewart, disposed to the concurring pursuer, Mr Kellie M'Callum, all and sundry the lands and teinds of Braco, Deanskeir, and Dunse, lying in the parish of Muthill and sheriffdom of Perth, and assigned to him, at the same time, the writs of the said lands and teinds, and whole clauses of warrandice, etc. The lands in question were originally feued out, in terms of the feu-contract of date February 1, 1705, by James, Marquis of Montrose, in favour of David Graham in liferent, and James Graham, his eldest son, in fee; and his Grace the Duke of Montrose, the defender in the present action, is now the superior of the lands, as the successor and representative of his ancestor the said James, Marquis of Montrose. Prior to the date of the disposition by the pursuer, Sir William Drummond Stewart, to Mr Kellie M'Callum, a question had arisen betwixt Sir William and the Duke, whether the latter, in terms of an obligation to that effect in the original feu-contract, was not liable to relieve the vassal in the feu of augmentations of stipend, localled upon, and becoming payable out of the teinds of the lands, subsequent to the date of the contract; and it was part of the arrangement betwixt Sir William Drummond Stewart and Mr M'Callum, at the date of the sale to the latter, that Sir William should undertake the burden of trying that question with the superior. The ground of the obligation is contained in the following clause of the original feu-contract:—"And farther, in regard the said Mr David Graham has payed als great a pryce for the saids teinds, parsonage and vicarage, as for the stock of the said lands, therefore the said James, Marquis of Montrose, binds and obliges him, and his foresaids, to warrant the said teinds, parsonage and vicarage, @ disposed to be free, safe, and sure to the said Mr David Graham, and his said son, and his foresaids, from all ministers' stipends, future augmentations, @nuities, and other burdens imposed or to be imposed upon the said teinds, except allenarly the ministers' stipends and schoolmasters' fees aftermentd., presently payable furth of the said teinds." In 1843 the lauds and teinds came by progress to the late George Drummond Stewart, and ultimately, through a variety of singular successors, to the pursuers of this action. None of the charters or precepts granted by the superior after the date of the feu-contract in 1705 made any reference to the obligation to relieve the vassal of augmentations of stipend, and none of the conveyances in the numerous transmissions of the property to singular successors made any specific mention of this obligation of relief; and, when the lands were sold, the purchaser was taken bound to pay the minister's stipend and other public burdens from the date of his entry, without reference to any claim of relief against the superior. The Lord Ordinary (Mackenzie) *held*, that the obligation of relief had not been duly transmitted to the pursuers, and assoilzied the defender. The First Division, on account of the general importance and novelty of the question involved, remitted to the whole Court. All the Judges of this Division, and Lords Wood, Ardmillan, and Kinloch, being of opinion that



the obligation had been transmitted to the pursuers, there was a majority of one against the interlocutor of the Lord Ordinary, which was accordingly recalled—the other five consulted Judges being of opinion that it ought to be adhered to.

WILSON v. DOUGLAS, ETC.—*Feb. 21.*

*Process—Printing of Records.*

In this case seven directors of the Western Bank are defenders. They had each made a separate appearance by separate counsel, and had made up a separate statement of facts on record. The Lord Ordinary, in the interlocutor closing the record, appointed it to be printed, in terms of the statute 13 and 14 Vict., c. 36, sec. 6. The pursuer printed 200 copies, and claimed one-eighth part of the printer's account from each defender. The defenders having refused to pay the proportions claimed, the pursuer enrolled the case for decree, and the Lord Ordinary found that the number of copies printed was a proper and suitable number, each defender being entitled to receive an eighth part of the copies, and granted decree as craved. The defenders now reclaimed. After hearing the reclaimers' counsel, the Court, without calling on counsel for the respondent, adhered, and found the reclaimers liable in expenses since the date of the Lord Ordinary's interlocutor, which were modified to L.4, 4s.

BROWNIE v. MACAULAY.—*March 9.*

Action of damages by a workman hurt through the defective construction of a scaffold. *Held*—The master was liable; and it was no answer to say the fault was the fault of the foreman, because a foreman is not a *collaborateur*, and the case was thus different from the *Bartonshill* case, 3 M'Q. Ap. 266.

BUCHANAN v. HEUGH'S TRUSTEES.—*March 13.*

*Deed—Heritable and Moveable.*

Whether part of the trust-estate of the late John Smith, writer, Bathgate, be heritable or moveable, is the question here between his brother's heir-at-law and his sister Mrs Heugh's trustees—the former claiming it as heritable, and the latter as moveable property. The question turns upon the construction of the fourth and last purpose of the trust, which is expressed in these terms:—"And, *fourthly*, I direct and appoint my said trustees to pay over the residue and remainder of my means and estate generally above disposed, or the prices and produce thereof, to my brother, Major Archibald Smith, residing in Edinburgh, and the said Mrs Margaret Smith or Heugh, my sister, equally betwixt them, share and share alike, and their heirs and assignees whomsoever, with all the rights and securities thereof which may be vested in my trustees." Lord Ordinary Ardmillan *held*, that by this clause there was given an ample power of sale, which was equivalent to a direction to sell and turn the heritage into moveable property. The Court adhered; holding, that from the structure of the entire deed, a sale and distribution of the estate was intended, and accordingly gave judgment in favour of the truster's sister's trustees.

YOUNG v. LIVINGSTON.—*March 13.**Jurisdiction—Process—Company—Citation.*

The firm of Allan Livingston and Son carry on business as brick and tile manufacturers at Portobello, and Rentonhall, near Haddington. George Young, smith and carter, Haddington, supplied them with coal for the works at Rentonhall. He brings action against them for the amount of his account, and is met by the defence that the Sheriff of Haddington has no jurisdiction over them; the defenders pleading that, "neither of the defenders having any residence or domicile in the county of Haddington, they are not subject to the Sheriff's jurisdiction for a civil debt." The defender says that he is sole partner of the firm, and only lessee of the brick-work, and that his father is not a partner; that there is no company, and that he could not be cited at the office of the company at Rentonhall. That office was a temporary erection, or shed, as the defender called it; but he paid his workmen there, he had a clerk there, and he occasionally went out and transacted business at the place. He had no house, and never resided at the place, and never slept in Haddington, but always returned to Portobello. Both the Sheriffs sustained the defence of want of jurisdiction. The Court recalled their judgments. The Lord President said that Allan Livingston and Son was a company, and a company carrying on business at Rentonhall, in the county of Haddington, where they had a brick and tile work. At that place they had an office, great or small. The pursuer furnished coal for their establishment at Rentonhall; and he cites the company, Allan Livingston and Son, at their place of business, where they paid their workmen, and where he delivered the coal. The defender pleads that he is not a company; that he is only an individual; and that his father, old Livingston, had retired. It is not said that the pursuer knew of this. The defender had taken the name of Allan Livingston and Son. That was not his own name. It was his own name and something else. It was the name of a company, and he was not entitled to plead the reverse after he had adopted that name.

R. N.—GEORGE GREIG v. J. D. KIRKWOOD.—*March 15.**Process—Expenses.*

In this case, the parish of Edinburgh had sued the parishes of Govan and Barony to be relieved of the maintenance of a pauper named Allan. After some litigation, the parish of Govan admitted liability; whereupon Lord Kinloch found that parish liable in full expenses to the parish of Barony, and also to the parish of Edinburgh, from a certain date. This interlocutor was reclaimed against by the parish of Govan, which maintained that the parish of Edinburgh should be found liable in the expenses incurred by Barony; and also by the parish of Edinburgh, which maintained that either Barony or Govan should pay its expenses incurred previous to the parish of Govan being called. The Court refused both reclaiming notes, and found Barony entitled to additional expenses.

INGLIS v. DOUGLAS, ETC.—*March 20.**Western Bank Shareholders v. Directors.*

The Court found that there was a want of specification of the averment in the record as to the desperate nature of the debts and other matters

said (as the ground of misrepresentation) to be known to the defenders; that the record ought to be withdrawn, and a new record made up, setting forth more distinctly the grounds of action. The Lord President (taking Inglis' case as the leading case) said, that there were, he thought, the elements of a competent claim made by the pursuer against the defenders, or some of them. There was an allegation that the defenders put forth false statements in regard to the condition of the Bank, knowing them to be false, with the view of misleading the public, and giving a fictitious value to the shares in the market; that they did so by means of reports and abstracts in which they represented certain sums as good assets of the company, while, in truth, they were bad and irrecoverable debts; and that they declared dividends which were not paid out of the profits, but out of the remanent capital of the company. He thought that, by going through the case with industry and care, he could find in it the substance or germ of such statements and allegations, but it was not without some industry and much care that he could find what was the real essence of it. No doubt this had arisen very much in consequence of the action having been originally, though no longer, directed against the Western Bank and its liquidators, and containing conclusions which were now out of it. But in regard to what remained, he thought that in material parts of the record there was a want of that specification and of that information to the opposite party which was necessary to the safe conduct of a trial in such a cause. One great basis of the misrepresentation was stated to be the assumption that certain balances or accounts were good assets of the company, when truly they were bad and irrecoverable debts. Article 28 set out that debts of that description were included in certain accounts named—in the Sundry Debtor's Account, L.350,501; and in the Protested Bills Account, L.26,000, etc. The accounts included in the Protested Bills Account in the balance-sheet amounted to L.123,000; and it was said that bad and irrecoverable debts to the amount of L.26,000 were included in that sum. Now, what were the accounts which were desperate and irrecoverable? How could the defenders be prepared to show that any one of these accounts said to have been desperate and irrecoverable was so regarded at the time? There was no specification there. And so in the credit accounts L.368,000 were said to have been bad and irrecoverable. Now the credit accounts amounted to L.1,844,000; which of the L.1,844,000 was said to have been desperate and irrecoverable? The same might be said in regard to other accounts. It appeared to him that the pursuer ought to have pointed out the balances and debts which were alleged to have been bad and irrecoverable, so that the defender might meet that case. Then it was said throughout the record, that the knowledge was in the defender and in a Mr John Taylor; but he had been dropped out of the action; and there were some other expressions which were a little equivocal, and which ought to be put right. Because it was necessary at this stage to look at the case, to see how it could be tried for the interest of the pursuer and defender. It was most important that the pursuer should not be deprived of his rights at the trial by reason of any difficulty as to whether these points were within the cause or not. It was also most important to the defenders, that they should know precisely what the case was that they were to go to trial upon; and it would be very unfortunate if the

case went to trial in a mass of confusion, in which it would be almost impossible to explicate the merits of it with justice to the party who was entitled to justice. An objection was taken to the action as being laid alternatively, and reference was made to the judgment in the Torbane-hill case. But that judgment had nothing to do with the question. He thought, therefore, that this case stood in a very unsuitable condition for going to trial. He thought that there were in the action, as laid in the original summons, germs of a case upon the ground of misrepresentation; but to put the case in proper shape, it would be necessary that the record should be purified in some form or other. The issues, too, would require to be much more specific than those which had been given in; and he thought the party must schedule his damages. The other Judges substantially concurred. The Court agreed to give expenses, reserving the question of amount until the new record be closed and considered.

**WESTERN BANK LIQUIDATORS v. AYRSHIRE BANK SHAREHOLDERS.—**

*March 20.*

*Joint Stock Company—Registration.*

The pursuers seek from the defenders calls for L.125 on 405 shares. The defenders plead *in limine*—(1.) That the Western Bank having stopped business in November 1857, could not be competently registered under the Joint-Stock Companies Act, which passed in December 1857; and (2.) The defenders are either partners of the Western Bank, or they are not. If they are, then the appointment of the alleged liquidators is null, the defenders not having been called to the meetings. If they are not, then the whole conclusions of the summons are inept, and the defenders are not liable for the calls. Lord Ordinary Jerviswoode repelled both pleas, and to-day the Court adhered, repelling them only in so far as preliminary. The Lord President thought the Western Bank competently registered. The Acts under which it was registered were not exclusively winding-up Acts, but a company could be registered for the express purpose of winding up. A company is entitled to register at any period of its existence, even *in articulo mortis*. (Laughter.) It is indeed said that this company was defunct; but it was not so, it was only moribund, or in a state of suspended animation, or asleep; it might have waked up again at any time and gone on. The dilemma as to the meetings was, like other dilemmas, somewhat dangerous to those who use it. It can be turned both ways. In so far as preliminary, he was for repelling that defence. There might be something in the fact that the defenders were not called to the meetings, as showing that they were not considered members.

**MELVILLE v. ROBERTSON.**

*Settlement—Process—Res Judicata.*

In this case, which raised an important question in the law of settlement, the Court held, that a small debt decree concluding for *parish* aliment was not *res judicata* in an action raised two years after, about the same pauper, by the same parish, against the same defender, and concluding to be relieved of the future maintenance of the pauper.

## SECOND DIVISION.

GORDON v. MELDRUM SISTERS AND PRATT.—Feb. 24.

*Bill of Exchange—Onerosity—Proof.*

This was an action at the instance of the indorsee of two bills of exchange against the acceptors. The only defence was, that the indorsee was not an onerous holder. The defenders, for the purpose of instructing non-onerosity, resorted to a proof by writ, and the Lord Ordinary found that in that proof they had failed. In consequence of that judgment a reference was made to the oath of the pursuer in general terms; but the subject-matter of the reference was the non-onerosity of the bill for L.99, 10s. In considering the oath, the Court were asked to consider along with it certain writings, as to which the pursuer deponed that they are all genuine and authentic documents, and were really what they bear to be. In delivering judgment, the Lord Justice-Clerk (with whom Lords Wood and Cowan concurred) observed—The oath has proved that these are genuine documents, and relate to the matter referred. I do not know that anything results from that, but that they would be admissible in evidence, if we were in a proof *prout de jure*; but it was fixed by the interlocutor sustaining the reference that we are in a case of proof by the oath of party. It seems to me to be an insuperable obstacle to giving effect to these documents, that we are in a case where the proof is limited to what is deponed to under the reference. It is not difficult to make writings available in an examination on reference if what is necessary is done, which is to put the writings into the hands of the deponer, and to put the necessary questions in reference to them, the answers to which are made part of the evidence. All that is evidence is what the deponer says on his oath. The pursuer had sworn, however, that the pursuer, who originally obtained the bill for another purpose, was afterwards told to retain it as a security for debt. Now, the question we have to decide is, has the pursuer who pleads this bill given value for it in any proper sense of the terms? According to the argument of the defender, a bill would never be onerous which was granted for a previous advance. But we find that every day bills are transferred in security of previous advances. Such seems a most natural use of a bill, and there are instances of it every day. It is a contract of pledge, and it is an onerous contract of pledge, though the advance was made some time before. No doubt it was not intended, when the bill was put into Gordon's hands, that it was to be held as a security for a previous advance. But a bill may be put into a party's hands for a particular purpose, and there may be engrafted on his title of possession a different purpose. On these grounds, it was impossible to hold that the oath is affirmative of the reference, or that the evidence of value is to be struck out of it as extrinsic. Lord Cowan differed, on the ground that the existence of the debt at the date of the alleged constitution of the bill as a security was an extrinsic fact, and required to be proved *aliunde*.

*Ex parte URQUHART, Pet.—March 2.**Appointment of Tutors under Exchequer Act.*

This was a petition for the appointment (as tutor-dative to certain pupils) of a gentleman who, as the nearest agnate of the pupils, was en

titled to have himself served tutor-at-law. Counsel were heard on a former occasion. The Lord Justice-Clerk remarked, that the Court was called to exercise a jurisdiction transferred to them from the Court of Exchequer by the 19 and 20 Vict. In the present case there was the peculiarity that the party who was proposed as tutor-dative was entitled to be served tutor-at-law. On inquiry into the practice of the Court of Exchequer, the Court had found no authority for holding such an appointment to be incompetent; while Stair, Bankton, and others, were of opinion that it was competent. Nor was it, as an absolute rule, inexpedient to make such appointments. On the other hand, they would not indicate a rule to the effect that it was expedient to do so; on the contrary, the Court would, in ordinary cases, leave the tutor-at-law to make up his titles by service. Circumstances, however, must justify the present course. Here the estate was small; the expense of service would be heavy; and all the nearest relatives on both sides consented. The Court therefore granted the petition.

OVEY v. SMITH.—*March 3.*

*Marine Insurance—Collision.*

The screw-steamer "Excelsior," of which the pursuers are owners, while on her way to Belfast, and being at the time sufficiently manned, and having a licensed pilot on board, came into collision with a steamship called the "Mail," then on her way up the Mersey to Liverpool. In consequence of the collision, the "Excelsior" cut into the "Mail" on the port-bow, up to within a few feet of the fore-mast, and five steerage passengers on board the "Mail" were killed, and five other passengers on board of that steamer were severely injured. In consequence of the death and injury of these passengers respectively, the pursuers became liable to pay, and have paid, a sum of L.994, 15s. 5d. The pursuers demand from the underwriters repayment of the sums so paid, to the extent falling on them respectively under the different policies. The policy under which the claim is made runs in the usual terms as a policy of insurance. And on the margin of the policy the following clause has been added:—"And we further covenant and agree, that in case the said ship shall come into collision with any other ship or vessel, and the assured shall, in consequence thereof, become liable to pay, and shall pay, any sums not exceeding the value of the said ship or vessel, 'Excelsior' (s.s.), and her freight, by or in pursuance of the judgment of any court of law or equity, or by or in pursuance of any award made upon any reference entered into by the assured without previous concurrence, we shall and will severally bear and pay such proportion of three-fourth parts of the sums so paid as aforesaid, as our respective subscriptions hereto bear to the value of the said ship or vessel 'Excelsior,' and her freight." The defender does not dispute his liability to make good, under this clause, any damage that might be done by the collision to the hull or the machinery of the "Mail;" but he maintains that the clause does not infer repayment of sums paid as damages for loss of life or bodily injury occurring to passengers on board that vessel. The Court, altering the interlocutor of Lord Kinloch, held that the pursuers were entitled to recover under the special clause. The Lord Justice-Clerk observed, that the Court were called, for the first time, to construe

the terms of an obligation of considerable importance in practice. The clause was very general and comprehensive. The case it referred to was a collision with another ship; and when, in consequence thereof, the owners of the ship insured had to pay any sums—it was not specified to whom, on what loss, or on what view of liability—the only restriction was, that it must be a payment which the owners became liable to pay in consequence of the collision. If the owners were thus to become liable, the obligation of the underwriters was just to relieve them of the sum paid. Did the sum paid by the owners in the present case fall under this clause? He could see no ambiguity nor room for construction of the clause which might have allowed the Court to consider which interpretation was most agreeable to the general tenor of a policy of marine insurance. This clause could not bear two meanings; still, it was reasonable to consider what the nature of the policy was. It was one on the ship, but not on the cargo or freight. If the Lord Ordinary's view were correct, the owners would have no claim for damages paid by them in consequence of injury done to the cargo of the vessel run into. But this was clearly not contemplated—the damages extended to the contents of the ship as well as to the ship itself. This was not an indirect assurance of the ship run down, but a guarantee of relief from claims to be made against the owners of the ship insured. To refuse the owners of the “Excelsior” relief from claims so made upon them, would simply be to contradict the express words of this “collision clause.”

COLQUHOUN v. WILSON'S TRUSTEES.—March 6.

*Property—Feu-Contract—Rei Interventus.*

Sir James Colquhoun brings this action of declarator to have it found that a valid agreement was entered into between him and John Wilson of Dundyvan, by which the latter bound himself to feu fifty acres of the lands of Ardenconnell, and to pay a certain sum for the mansion-houses, offices, etc.; as also, that an agreement was entered into to feu an additional space of twelve adjoining acres, and that the feu-contract to be entered into should contain the clauses and conditions usually inserted in the feu-rights granted by the pursuer. The Court found that a valid and binding agreement had been entered into. They held that the writings produced—an offer and conditional acceptance—constituted a contract, no doubt conditional and incomplete, but which might be made complete *rei interventu*. Direct parole evidence that the offerer had agreed to the conditions of acceptance, or that the acceptor waived these conditions, would be incompetent; but it was a well-known principle of law, that such a conditional acceptance might be made pure, and such an incomplete contract might be made binding, by *rei interventus*. If the *rei interventus* were ascribable to anything else, it would not validate the contract. Here, however, what Wilson had done—making roads, pulling down walls, etc.—was unintelligible, except on the footing that he understood he had acquired the full rights of a proprietor, while Sir James Colquhoun's acquiescence was irreconcilable with any other supposition than that he believed he had finally parted with the property. By that *rei interventus* the contract, originally conditional and incomplete, became unconditional and complete.



INSPECTOR OF POOR OF ROTHES *v.* INSPECTOR OF ABERLOUR.*Poor—Settlement—Parish of Birth.*

A. S. resided, with his wife and family, in the parish of Aberlour for four years previous to Whitsunday 1853, when he entered the service of a farmer in the adjoining parish of Inveravon, where he remained till accidentally killed, on 29th March 1854. During this latter period he had no right to absent himself; but, with the leave of his employer, he passed the Saturday nights and alternate Sundays with his wife and family, for whom he had taken a house in Aberlour. His widow remained in this house for some time after his death, till Whitsunday 1854. On the 9th September, she applied for and received relief in the parish of Knockando. The inspector of that parish raised action for relief against the inspector of the parish of Rothies, where Simpson was born, and of Aberlour. The Court adhered to the Lord Ordinary's interlocutor, and *held* that the parish of birth was liable, on the ground that they could deal only with the fact of personal presence as a resident within the parish. Nothing else under the statute was sufficient to fix liability on any parish. The pauper was not resident at Aberlour at his death, nor for ten months previous to that event. His previous residence in that parish had only continued for four years; he had, therefore, no residential settlement in Aberlour. Whether, if his continuous residence had extended to the time of his death, it would have been possible for his widow to eke out the remaining two months necessary for the acquiring of a residential settlement by her own residence, after her husband's death, was a question which did not necessarily arise in this case. The Court would not, however, give any countenance to the notion that that sort of combination was sufficient to establish a settlement under section 76 of the statute.

BAIN *v.* BAIN.—*March 16.**Parent and Child—Aliment.*

The pursuer is the daughter of the defender, who is a farmer, factor, and ironmonger in Thurso. After his second marriage, the pursuer not agreeing with her stepmother, the defender gave a furnished room adjoining his house, and five shillings a-week, but forbade her to have any communication with his family. Finding, as she states, such a state of things unbearable, she came to Edinburgh, and now seeks a larger aliment than five shillings, which the father refused to give. After hearing counsel, the Court refused to interfere between parent and child; holding that all the parent was legally bound to do was to preserve the child against want, and that anything further was a matter between God and the father's conscience. The pursuer did not aver that 5s. a-week, with a furnished room, was insufficient for her maintenance in Thurso; and she did not aver that she was unable to do anything to support herself. The case was a painful one, but the feeling of the Court must not sway their judgment.

LIQUIDATORS OF WESTERN BANK *v.* DIRECTORS.—*March 20.**Appeal—Judicial Discretion.*

In this case the defenders asked for leave to appeal to the House of Lords on various points which have been decided on the preliminary

defences. The Lord Justice-Clerk was of opinion that the petition for leave to appeal at this stage ought to be refused. The object of the Act 48 George III. was to remove an intolerable evil—the practice of appealing to the House of Lords against every interlocutory judgment. It fixed that, as a general rule, it was not competent to appeal against such judgments, unless—1st, there was a difference of opinion in the Court; or, 2d, when the express leave of the Court was obtained to appeal. It was not to be supposed that the Court, as a general rule, ought to grant such petitions; to do so would be to defeat the object of the statute. The magnitude of the case was not a sufficient ground for granting leave to appeal; for it was rather a ground for all reasonable despatch. Both parties had an interest in despatch: any interest in delay was not legitimate; and without going very far, it might be almost assumed that the defenders' counsel were never confident in the ultimate success of these dilatory defences. It was necessary to guard the pursuers—ay, and the defenders, if they knew their true interests—against the evils of delay. He had no hesitation in refusing to hang up this case for an indefinite time. The Court accordingly refused the petition.

TAYLOR v. JARVES.—March 20.

*Interim Extract—Stat. 13 and 14 Vict., cap. 36, sec. 28.*

A decerniture for the expenses of trial of a point in this case having been pronounced, the pursuers moved the Lord Ordinary (Kinloch) to grant warrant for interim extract of the decree. His Lordship reported the case to the Judges of the Second Division. As the point is of considerable importance in practice, we insert his Lordship's note, which embodies the grounds of the ultimate decision of the Second Division. Our report, to which his Lordship makes reference, is, we believe, a correct statement of the actual decision of the First Division on this point; though, of course, we are unable to surmise whether their Lordships intended that decision to form a precedent for future cases.

*Note.*—The Lord Ordinary, by his interlocutor of 10th March current, decerned, in this case, in favour of Messrs Taylor and Son for a sum of L.265, 3s. of expenses. The process not being then at an end, this was an interim decree.

Messrs Taylor and Son having moved the Lord Ordinary to grant warrant to this decret *ad interim*,

It appeared to the Lord Ordinary that this motion was rendered unnecessary by the 28th section of the Act 13 and 14 Victoria, cap. 36. The rubric to this section is—"Interim decrees to be extractable without special allowance," and the section runs as follows:—"And be it enacted that every act and warrant and decree granted, or to be granted, during the dependence of a process before the Court of Session, and which, according to the present practice, might be extracted *ad interim*, if special allowance to that effect were granted by the Lord Ordinary or the Court, shall be extractable *ad interim*, without the necessity of such special allowance, unless the Lord Ordinary or the Court shall otherwise direct."

It is known to the Lord Ordinary that this enactment has, ever since

the date of the Act, been considered in practice to make all interim decrees extractable without a special allowance of extract. And, on any sound construction of the words of the Act, the Lord Ordinary conceives this to have been its true intention. The Act, in referring to "every act and warrant and decree," comprehends, as the Lord Ordinary conceives, two separate things well known in the practice of the Court as distinguishable—viz., 1st, An act and warrant; 2d. A decree—the latter being the ordinary decree for payment or performance.

But the Lord Ordinary has been informed that the extractor of Court has recently stirred a doubt in this matter, and will not extract the decree in question without a special warrant from the Lord Ordinary. And it is said that their Lordships of the First Division gave recently such a special warrant in a similar case. A memorandum is said to have been presented in that case by the extractor to the Lord President of the Division, the benefit of which has been communicated to the public, by its being printed in the *Journal of Jurisprudence*, No. 38, p. 101.

If the Lord Ordinary had thought that their Lordships of the First Division had intended to lay down a rule to regulate all future cases, he would have considered it his duty to follow the rule, without the slightest demur. But he has reason to believe that such was not their intention, and he therefore reports the point, that both he and the profession may receive authoritative guidance.

It is right he should state that he is by no means satisfied with the views expressed recently by the extractor. He thinks the statute did not point at the peculiarity of an act and warrant, as distinguished from an ordinary decree. And the acts and warrants referred to by the extractor are so little within the purview of the clause, that to no small extent they are *final* judgments, with which the clause did not intend to deal. What the statute pointed at was the *interim* character of the judgment, whether act and warrant or decree; and what it intended, according to the Lord Ordinary's view, was to save the necessity of formally authorizing extract of a decree which the very act of pronouncing it (and not merely issuing findings) implied that the Court intended to be carried into effect. When the Legislature dispensed with a formal allowance of extract, they placed matters in all respects as if the formal allowance had been granted; and all the regulations as to the custody of the process, and the like, applied exactly as in the old case of an interim decree, with special warrant for extract. It costs, of course, very little trouble to give the formal allowance; but if the statute intended to dispense with such formal allowance, it appears to the Lord Ordinary that to restore it would be simply frustrating the statute; and to do so might cast an awkward doubt over whatever decrees have, since the date of the statute, been extracted without a special warrant.

(Initialed) W. P.

The Court to-day refused the motion as unnecessary.

## OUTER HOUSE.

March 2.—LORD JERVISWOODE.

HUNTER v. LINTON.

*Cumulo Penalty.*

This was a suspension of a conviction under the Forbes Mackenzie Act, in which various objections were urged against the regularity of the proceedings complained of. To one of these it appears that the Lord Ordinary has given effect; the objection being rested on the ground that the complainer was charged with two separate offences, for which distinct penalties are provided by statute; and that, while he was found guilty of two offences charged against him, he was found liable in one *cumulo* penalty. The sentence was vindicated, on the part of the respondent, on the ground that the penalty thus inflicted was less than the amount which it was within the powers of the judge who imposed it to inflict for either of the offences, taken singly, of which the complainer was found guilty, and that the complainer had thus no legitimate, or at least no reasonable ground, of objection. The following extract from his Lordship's note will explain the grounds of the decision:—"It appears to the Lord Ordinary that the question which he has here to determine is, whether or not it was within the powers conferred by the statutes under which alone the penalty could be imposed at all, to do this in the mode here adopted. The Lord Ordinary thinks not, for the simple reason, that the statute, which, being of a penal character, is liable to a strict interpretation, confers no such power, and that, looking to the terms of the 14th and 15th sections of the Act of the 16 and 17 Vict., cap. 67, under which the complaint in this case proceeded, the penalties thereby enacted are separate penalties, and cannot be accumulated or thrown into one, as is here done. Not only are these penalties different in amount, but the terms and conditions of the imprisonment, which may be awarded on failure to pay the penalties, are also different in important particulars. True, no sentence of imprisonment has yet been pronounced or applied for in this case; but in the question of construction of the Act, and of the powers conferred by it, it is important to see how far the Legislature has dealt with the offences in the two sections, as the same, or as different offences. The Lord Ordinary thinks it obvious that, in the present case, the two offences charged are distinct; that separate penalties are attached to each; and that, when the judge convicted of both offences, and resolved to award a punishment for both, he ought to have separated the penalties, so that it might have appeared, on the face of the conviction, whether or not the proportion of penalty, applicable to each offence, was in accordance with the provisions of the statutes."

M<sup>r</sup>ARTHUR v. LINTON.*Conviction—Res judicata.*

In this case, which was a conviction for selling spirits without a license, the defence set up was, that the seller was the master of a "club," and that the liquor was supplied to the members of that establishment. The suspender also pleaded that this defence had been sustained in a previous prosecution before a different judge. The Lord Ordinary passed the note of suspension on the same grounds as in Hunter's case. From the sub-

joined portion of his note, however, it will be seen that he is of opinion that the special grounds of complaint,—viz., that Sheriff Hallard had decided the question already, and that, therefore, the complainer could not be tried again,—were not valid reasons for suspension :—"The peculiarity in the present case arises under the second and third pleas, the latter of which was pressed strongly in argument on behalf of the suspender. The Lord Ordinary listened to the argument with the respect due to the manner in which it was brought under his consideration, but he has been altogether unable to give effect to it. As regards the second plea, it appears to him not to be relevant as stated. As regards the third, he desiderates facts on which the plea is founded. How can it be said that the judge who tried the case, to which the present suspension relates, overturned and reversed the judgment of the Sheriff, which was pronounced in another case? That judgment stands untouched. It may be that the magistrate who decided the case now in question may have taken a different view of the law from that entertained by a preceding judge; but where the offences charged were new offences (of precisely the same character no doubt), and were proved by evidence applicable to these new offences, can it be said that the judge was bound by the decision of a preceding judge in a case, of the evidence adduced in which there was no competent record? Further, if there had been such a record, was the judge to surrender his own judgment and pronounce what he, acting under the sanction of the oath of office, might, in his conscience, consider to be an unjust judgment on the evidence adduced? *Quomodo constat*, that, if Mr Hallard had sat as judge in the present case, he would have acquitted the complainer. And shall the magistrate's judgment be suspended because he has exercised a discretion which could not have been denied to Mr Hallard, from whose judgment he is accused of dissenting? The Lord Ordinary has been unable to satisfy himself of the validity of this ground of suspension; as to which he has thus given expression to his general views for the information of the parties, although, as he passes the note on a separate ground, it might have been unnecessary that he should enter into it."

### HIGH COURT OF JUSTICIARY.

MATTHEWS AND RODDEN *v.* LINTON.—*Feb. 27.*

The two suspenders had, in the Edinburgh Police Court, been found guilty of a breach of the public peace in a private house, and had been sentenced to sixty days' imprisonment, while two who were tried with them were subjected to a lighter sentence, the prosecutor, after conviction, and not on oath, having made certain statements prejudicial to their character. The suspender maintained that in a private house there could be no breach of the public peace, or every one who had a dancing party and music, which disturbed all the neighbours, would be liable to be convicted, however respectable. The Court repelled the reasons of suspension, holding that there was a relevant charge of a breach of the peace, and that there could be a breach of the public peace in a private house, and that there was no relevant allegation of oppression; Lord Ardmillan, however, expressing his disapproval of public prosecutors in the Police

Court, after conviction, giving evidence and opinion of character either in answer to questions from the bench or voluntarily.

JACKSON v. LINTON.—*Feb. 27.*

*Attempt to Steal.*

James Jackson, "ill-used pickpocket" and tailor, seeks to suspend a sentence of Bailie T. Russell of Edinburgh, on a complaint which charged the suspender with attempting to pick pockets. It was stated that he was not apprehended on any charge at all, that the policeman who had apprehended him fainted on his way to the Police Office, and that he might have escaped had he chosen, but that he remained beside the police officer till he recovered. For the suspender it was argued, that it had been decided in the High Court, in the case of Walter Duthie Ure, February 15, 1858, that attempt to steal is not a crime known to the law. In the present case there was no description of what is meant by attempt to pick pockets, nor was it said whose pockets were attempted to be picked, an indefiniteness which was unusual, if not unprecedented. The Lord Justice-Clerk had had considerable difficulty, as the complaint had been dealt with as a libel on both sides of the bar. But in the Edinburgh Police Act it is not necessary to lay a complaint in the form of a proper libel. He was of opinion that it is sufficient as a police offence to charge a prisoner with attempting to pick pockets at a particular time and place. As to the criminality of it he had no doubt, and never had. If nothing else, it was a plain breach of the peace, and a breach of the peace with a felonious intent. Lord Cowan observed, that the case of Ure remained intact, as it only decided that such cases were not cognizable in this Court.

BIRRELL v. JONES.—*Feb. 27.*

*Authenticating of Sentence.*

This attempted suspension of the Annan Justices having been disposed of unfavourably to the suspender, except as to the one point, whether one of four Justices can sign as preses for the others by writing J.P.P. after his name, the judgment of the Court was now delivered by Lord Ardmillan, who said he should be sorry if their judgment should disturb the general practice of the preses of the Justice of Peace Court signing for all who are present. But in this case the procedure was entirely statutory. The conviction stands alone, and is the sole record of procedure. There is no interlocutor, no sentence, and no extract, nothing but this conviction. And the form of what it ought to be is to be found in the 9th section of the statute (the Day-poaching Act) inserted in the body of the section, and not as a schedule. The plain meaning of that section is that the accused is to be convicted by two Justices, not by anybody calling himself preses, but by two Justices, both of whom must concur, and he was of opinion that their concurrence must plainly appear, and that it could be proved only by the signature of both Justices. That was all the more necessary when a conviction of this kind could be signed, as this conviction was signed *ex intervallo* by a Justice out of Court, and outwith the presence of the other Justices sitting at his own table. The signature of both Justices was the best and only evidence of concurrence of both. Lord Neaves and the Lord Justice-Clerk concurred. Conviction quashed.

APPEAL IN THE HOUSE OF LORDS.<sup>1</sup>

PATRICK DAVIDSON *et al.*, Trs., *Appellants*; v. THE REV. GEORGE TULLOCH *et al.*,  
*Exrs.*, *Respondents*.

(February 21, 23, and 24.)

This was an appeal from the Second Division of the Court of Session. In 1828 a new contract of the Banking Company in Aberdeen was executed, and it provided as to the nature of the business to be transacted, and the meetings to be held. The late Mr Duncan Davidson, advocate in Aberdeen, was for some time governor, and was director from 1813 to 1828. At the final general meeting of partners held in 1827, the directors submitted a statement of the position of the bank, in which they represented each share of L.500 to be then worth the sum of L.700, and a dividend at the rate of 6 per cent. as out of free net profits for the then past year was declared and paid upon each L.500 share. Mr Davidson was professionally employed by the bank in 1828 to prepare the new contract, and he acted continuously as a leading director during the whole period of its endurance from 1828 to 1849. The managing committee included, besides Mr Davidson, Messrs Alexander Pirie, Alexander Bannerman, and William Read, all copartners of the firm of Milne, Cruden, and Co., and Mr John Garioch of Heathcote, and Mr Harry Lumsden, advocate, Aberdeen. It was now alleged that Mr Davidson, being related to Mr Pirie, and intimately associated with others, fraudulently and illegally, in his actings as a director of the said bank, promoted the private interest and objects of himself and his friends and connections, to the loss, injury, and damage of the company. This he did during the period from 1828 to 1839, in concurrence with the other directors, by making or allowing to be made advances to a very large extent out of the funds of the bank to William Pirie and others, without any security being given therefor, and at a time when he and the said other directors knew them to be unable to meet large debts already due by them to the bank, and were well aware, or had sufficient reason to believe, that the pecuniary circumstances of the parties were such that the advances so made would not be recovered. Moreover, that Mr Davidson and the other directors not only knowingly and wilfully concealed from the shareholders all knowledge of the large amount of the debts incurred, and of the unsecured advances made, but also falsely and *mala fide* misrepresented to them year after year the state of the bank's affairs. That owing to the advances to the individuals mentioned, amounting in the aggregate to L.521,727, 11s. 2d., a sum of L.357,924 was irrecoverable, though the loss was wilfully and designedly concealed from the knowledge of the shareholders. Such loss was much larger than the subscribed capital of the bank. That during all this time the directors presented to the shareholders, at their annual general meetings, reports of the most flattering character, falsely representing the bank as in the most prosperous circumstances, and as having realized large profits annually; and they recommended the payment of dividends as out of realized profits, at the rate of 6 and 7 per cent. Relying on these reports, which were largely circulated, the late Dr John Tulloch, Professor of Mathematics in King's College, Aberdeen, was induced in 1836 to purchase, and did purchase, ten shares of L.100, at the price of L.1910, being the then current market price. That Dr Tulloch was then totally ignorant of the real state of the bank, and had no means of becoming aware of its circumstances except from the directors' reports, which he read and believed to be true; whereas his representatives now allege they were totally false and fraudulent, for no profits had been realized at all.

<sup>1</sup> Before Lord Chancellor Campbell, Lords Brougham, Cranworth, and Wensleydale.

During the years subsequent to 1834, reports of the most flattering description were made, declaring dividends from 7 to 7½ per cent., in addition to a bonus in 1836 purporting to be paid out of realized profit. Notwithstanding these pretended profits, the directors, in 1842, made a call of L.2, 10s. per share towards further augmentation of alleged capital, the whole capital having been in reality lost before that date. The late Dr Tulloch, relying on the truth of these reports, paid on this call a sum of L.250, and the shareholders in all paid a sum of L.62,500. In October 1845, still representing the continued prosperity of the bank, professing that the capital should be extended "to place the bank on a wider basis," induced the shareholders to create new stock to the extent of L.200,000. The late Dr Tulloch, however, took no part of this stock. At the final general meeting in 1848, the directors still represented the affairs to be flourishing, announced a dividend of 6 per cent., and at the same time induced many shareholders to enter into a new contract; but on a meeting of the new shareholders, it was discovered that the previous reports were all fallacious, and there remained of the whole original and increased capital a sum of L.7047. Dr Tulloch, who had relied all along on the truth of the reports, on this discovery, intimated to Mr Davidson and his co-directors his intention to institute an action against them for recovery of his losses; and he did commence such action, but he died in 1851, and the proceedings were stayed in consequence.

In 1857 the present pursuers—viz., the Rev. George Tulloch, Free Church minister of Eddracullis, and the Rev. Patrick Tulloch, Free Church minister of Inveravon, being executors-dative of the late Dr Tulloch—instituted the present action against the representatives of the late Mr Davidson, who died in 1849, for reparation.

The defenders pleaded, that the statements in the condescendence were irrelevant and insufficient to sustain the action; that the defenders were merely executors, and were not liable for the alleged fraud and delinquency of the said deceased; that there were many other directors equally liable, who ought also to be called as defenders. The Lord Ordinary (Handyside) held that there was matter relevant to sustain the action alleged on the record, and that the action might proceed without citing the other directors. On reclaiming petition, the Second Division adhered to the interlocutor, whereupon the present appeal was brought. Meanwhile, in the Court below, issues were adjusted, with a view to a jury trial as to the facts alleged.

The LORD CHANCELLOR said, that he had no difficulty in affirming the interlocutors in this cause. What the House had to look to was, whether a sufficient cause of action had been alleged in the condescendence, and whether any answer had been given to it. Now, there were two causes of action alleged. The first was the misrepresentation of the late Mr Davidson in causing the late Dr Tulloch to purchase these shares; secondly, the further misrepresentation, after he had so purchased the shares, that the bank was in a flourishing state, while all the time the funds were misapplied and the shares rendered worthless. As to the first cause of action, if this had been an attempt on the part of Dr Tulloch's representatives to get rid of the purchase altogether, and recover back the money that had been paid for it, the action could not have been supported, for fraud did not make a purchase void, but merely rendered it voidable provided the purchaser take active steps to do so immediately after discovery of the fraud. Here, therefore, the purchase must stand; but the purchaser may sue for the damage caused by the misrepresentation. On considering, therefore, whether the allegations of misrepresentation are sufficient for that purpose, he thought they were. But the computation of the damages founded on that head could not be supported; for what the pursuers contend for is to be placed in the same situation as if he never bought the shares. That was not the correct way of estimating the damages. The true test is, the difference between the price actually paid and the fair price or real value of the shares at the time at which they were bought. That was all that could be recovered on the first ground of action. As to the relevancy of an action founded on the misrepresentation of a director as to the real state



of the bank, there could be no doubt, and he would not make a single observation. It had been disputed at the bar whether an action of representation for a delict of an ancestor could lie against his representatives; but he had no doubt whatever that it was the law of Scotland, that whenever one person committed a delict, thereby causing pecuniary loss to another, the representatives of such wrongdoer were liable in damages so far as they were *lucrati*—that is, so far as they had assets of the wrongdoer in their hands. It was contended that there was no sufficient allegation that the false statements were made so as directly to induce Dr Tulloch to purchase the shares; but what the condescendence says in substance is, that Mr Davidson falsely represented in the reports that the bank was flourishing, and that Dr Tulloch, relying on such reports, was induced to buy the shares. There is therefore here a *damnum cum injuria*, for which an action will lie. It was also contended that no action will lie by an individual shareholder against a director, provided all the other shareholders were equally injured by the act complained of. That was no doubt true as regarded all acts of the directors, which the general body of shareholders could ratify. But here what was alleged was, that the directors systematically lent the funds to persons whom they knew to be insolvent; and that they systematically misrepresented this conduct, and instead of losers, represented the bank being great gainers. These were acts which could not admit of being ratified by the shareholders at a public meeting, and so the rule did not apply to prevent this action at the suit of the representatives of Dr Tulloch. That being so, the second as well as the first ground of action was maintainable. Then came the issues. The first two issues were right enough; but as to the third, there were doubts whether it could be brought to any practical result. Yet, as the parties had apparently acquiesced in it in the Court below, it is unnecessary for the House to interfere with it. The appeal will therefore be dismissed, with costs.

Lords BROUGHAM and CRANWORTH both concurred.

Affirmed with costs.

DAVIDSON AND OTHERS v. TULLOCH AND OTHERS.

(*Second Appeal.*)

This was a supplemental appeal, in which the appellants prayed that certain interlocutors pronounced by the Court of Session might be reversed, on the ground that their former interlocutors had been appealed against, and that all proceedings should, therefore, have been stayed. The interlocutors now appealed from granted the respondents liberty to inspect books and papers, and approved of certain issues which they directed to be tried.

Their Lordships dismissed this appeal, with costs, on the ground that the Court of Session had no due notice of the appeal to the House of Lords, and that they had, therefore, proceeded with the utmost regularity to draw up the issues, there being no stay of proceedings. They approved of the first and second issues, but not of the third.

Appeal dismissed, with costs, accordingly.

## English Cases.

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**PROPERTY.—Right to Support—Neighbouring Properties.**—The plaintiff was owner of the reversion of an ancient house; the defendant, for more than six years before the commencement of the action, worked some coal mines more than 280 yards distant from the house. But no actual damage accrued to the plaintiff's land until within six years from the commencement of the action; and the question was, whether the Statute of Limitations is an answer to the action; or, in other words, whether the cause of action accrued within six years? The majority of the Court of Queen's Bench thought it did not. On appeal to the Ex. C., the judgment was delivered by Willes, J.—The right to the support of land and buildings stands on a different footing as to the mode of enjoyment, the former being *primâ facie* a right of property analogous to a right to the flow of a natural river. *Rowbotham v. Wilson*, 8 E. & B. 123, and *Caledonian Railway Company v. Sprott*, 2 Macqueen's House of Lords Cases, 449, are cases in which there was an exception to the prevailing rule; while the latter, that is, the right to the support of houses, must be founded upon prescription or grant, express or implied; but the character of the right, when accrued, is in each case the same. The question in this case depended upon what is the character of the right, namely, whether the support must be afforded by the neighbouring soil itself, or such a portion of it as would be beyond all question sufficient for present and future support, or whether it is competent for the owner to abstract minerals without liability to an action, unless and until actual damage be thereby caused to his neighbour. The most ordinary case of withdrawal of support is in town property, where persons buy small pieces of land, frequently by the yard or foot, and occupy the whole of it with buildings. They generally excavate for sewers, in all cases for foundations, and, in lieu of the support given to their neighbour's land by the natural soil, they substitute a wall. We are not aware that it has ever been considered that a mere excavation of land for such a purpose gives a right of action to an adjoining owner, or is in itself an unlawful act, although it is certain that, if damage ensues in such a case, a right of action accrues. So, also, we are not aware that, until the case of *Nicklin v. Williams*, it has ever been supposed that getting coal or minerals, to whatever extent, in a man's own land was an unlawful act. If he did damage to his neighbour, he was undoubtedly responsible; and a right of action was supposed to arise from the damage, and not from the act of the man on his own land. The law favours the exercise of dominion by a man on his own land, who is using it for a most beneficial purpose to himself. The defendant's proposition is, that the adjoining owner is entitled to have the adjacent land left in its natural condition. He does not and cannot contend that an artificial substitute would prevent a cause of action; for if he had admitted that one might excavate the natural soil to an extent dangerous to the adjoining owner, provided he found a remedy in time to prevent damage by a prop or a wall, this consequence would follow, that he must have time within which to do it; and that time would be any time until damage resulted, which, in effect, would be to say that there was no cause of action until actual damage. Now, if the defendant is right, this consequence follows:—wherever a mine or quarry is worked, the worker may be subjected to actions by all surrounding owners; nay, they would in self-defence be compelled to bring them if there was any reasonable ground to suppose that the working would in time produce damage to their property. It would be in vain that the worker should say, "You will not be injured; the workings are not injurious. If they turn out likely to be

so, I will take means to prevent it ; at all events, wait till you are injured." Vexatious and oppressive actions might be brought on the one hand ; but on the other, an unjust immunity obtained for secret workings of a most mischievous character, the result of which did not appear within six years. The inquiry in such cases would be little better than speculation,—the character of the soil, the inclination of the strata, the nature of the land supposed to be in danger, and other considerations, would make the inquiry of such a character that the only verdict would be "not proved." In many cases, damages would be given where none could be sustained ; but would in other cases be withheld where they ought to be given. Applying these principles, we think no cause of action accrued by the mere excavation by the defendant in his own land, so long as he caused no damage to the plaintiff, and that a cause of action accrued when the actual damage first occurred. We should be unwilling to rest our judgment upon mere grounds of policy ; but we cannot help observing that the rule of law, or rather the application of the Statute of Limitations, which would deprive a man of redress after the expiration of six years, when the actual cause of damage was unknown to him—when in very many instances he would be inevitably ignorant of it—would be harsh, and contrary to the ordinary principles of law. The judgment must therefore be reversed, and judgment given for the plaintiff.—(*Bonomi v. Backhouse*, 7 W. R. 667.)

**LAW OF PARTNERSHIP.**—Where advances are made to one partner with the knowledge and consent of the other partner, although the amount may be misapplied by him, it is a receipt by the partnership, and constitutes a debt against it.—(*Jackson v. Ogg*, 34 L. T. Rep. 6.)

**PARTNERSHIP.**—*Fraud—Misrepresentation—Evidence.*—B., a surgeon, took C. into partnership, representing to him that his practice produced about L.700 per annum. C. afterwards found that it did not produce half that amount, and that on the very year preceding the partnership B. had returned the profits to the Income-tax Commissioners at L.350. Held to be a misrepresentation, for which the Court dissolved the partnership, and decreed B. to return half the premium. Lord Chancellor: The Master of the Rolls appears to have made the decree in question here—as the Scotch lawyers say—*tota re prospecta*, and not upon the ground of any misconduct on the part of the defendant. The plaintiff's case is, that the defendant represented the profits as amounting to L.700 a-year, at the time of the negotiation for the partnership. If that representation were true at the time, the defendant would have incurred no liability by it, although the profits afterwards fell off. The onus lies on the plaintiff to show that it was not true ; and there is no doubt very serious evidence that it was not true, and that the profits did not amount to more than L.350 a-year when the new partner came in. The return to the Income-tax Commissioners was, perhaps, not conclusive against the defendant on this point. He might still make out, by other evidence, that his profits amounted to L.700 a-year. There was no evidence, however, of what the defendant's receipts really were ; the defendant, therefore, was guilty of misrepresentation, and on that ground the decree ought to be affirmed.—(*Jaunecy v. Knowles*, 35 L. T. Rep. 116.)

**SUCCESSION.**—*Will—Legacy—Division of a Day.*—Testator directed his trustees to purchase consols, obviously with the view of increasing a pecuniary legacy to his grandson, to whom he had bequeathed all the money and stock in the funds "which he might be possessed of, or entitled to, at the time of his decease." This direction was transmitted by the testator's country bankers on the same day they received it by letter to their brokers in London ; but the purchase was not completed until after the death of the former. The Master of the Rolls said—This is a case of great peculiarity of circumstances. The testator gave a specific legacy of all the money and stock in the funds which he might be possessed of or entitled to at the time of his death to his grandson, Mr Evan Llewellyn Thomas. On Monday, December 27, 1858, the testator, obviously

with a view of increasing the legacy to his grandson, directed him to go to Brecon, where the testator's country bankers carried on their business, and order them to invest L.5000 in consols. The Bank was not open on that day, but on Tuesday it was; and the bankers wrote by the evening post to their brokers in London, who received the letter on the next morning, Wednesday, and purchased the stock in the forenoon of that day. The testator, however, died at four o'clock on the morning of Wednesday, before the stock was bought. The reported cases throw no light on such a case as this. I cannot hold that the person into whose hands the stock was transferred was a trustee for the testator; and my opinion is that his grandson is not entitled to the stock.—(*Thomas v. Thomas*, 8 W. R. 71.)

**PUBLIC COMPANY.**—*Whether a Corporation can be guilty of a wilful wrong?*  
—This was an action brought against a rival Omnibus Company for interfering with the rights of the plaintiff, by driving their omnibuses in such a manner as to molest him in the use of the highway. The declaration set out various grievances that fell under that general description. The defendants demurred, and the ground of the demurrer relied upon for the defendants was that the charge was one of a wilful, intentional wrong, and that a corporation cannot be guilty of a wilful and wrongful intention; and, therefore, that the action does not lie. Erle, C.J., in delivering the judgment of the Court, commented on the fact that the whole of the acts charged against the defendants were acts connected with the driving of their vehicles, and the object of this corporation was for the purpose of driving omnibuses. The company is, he said, the "London General Omnibus Company," incorporated for that purpose; and, therefore, actual things done by the defendants are acts within the purpose of their incorporation, and unless they had been wrongfully done, of course there could have been no ground of complaint; but being wrongfully done, we think clearly the action lies, and that there are abundant authorities to show, that under these circumstances the action would lie. I take the whole tenor of authorities, from *Yarborough v. The Governor and Company of the Bank of England*, to *Whitefield v. South-Eastern Railway Company* (which last case is in reality against the Electric Telegraph Company, for a wrong in the way of taking away a character), to show that an action for a wrong does lie against a corporation, where the act of the corporation—the thing done—is within the purpose of the incorporation; and where it has been done in such a manner as to constitute what would be an actionable wrong in a private individual. The doctrine that was relied on by Mr Giffard is rather more quaint than substantial, that, because a corporation has no soul, therefore it is incapable of intentional malice. We do not in the smallest degree interfere with the decisions which have been uniformly established; but are only a little within the limits of the long tenor of authorities beginning with *Yarborough v. The Bank of England*, that being by no means the first. This is a well-considered and elaborate judgment, going over all the authorities; and from that case down to *Whitefield v. South-Eastern Railway Company*, there have been numerous authorities on the principle on which we rely; and I add, in confirmation of that, that we dwell the less on the ground that Mr Giffard so clearly pressed upon us, from the inconvenience to the public that would arise if these companies, incorporated for the purposes of trade, being in reality a partnership for the purpose of carrying on that trade, had a restricted limitation put upon their liability by reason of incorporation; and extreme difficulty, it seems to me, would follow, if we were to hold they were exempted from being responsible, because they intentionally wrong persons who were their fellow-subjects. We think it extremely important, if they do admit that they have, in fact, intentionally committed a wrong, that the public should have a remedy against them, and not have a remedy only against their servants and others whom they have employed, many of whom may be entirely incapable of giving the recompense that the law awards. We are, therefore, of opinion that the judgment should be for the plaintiff.—(*Green v. The London General Omnibus Company*, 8 W. R. 88.)

COUNTY FRANCHISE.—*Freeholder*.—In *Sherlock v. Steward*, 35 L. T. Rep. 100, the question was, whether, in estimating the value of a freehold, a commission of 5s. for collecting the rents by an agent should be deducted from the amount of the rent, in order to ascertain what was the net value. The revising barrister held that he might do so, and the Court, on appeal, sustained his decision. Erle, C.J.—It is clear that the value is what we have to look to, and it is found by the revising barrister that he could not have got 40s. by the year without the expenditure of L.5 from the rent. The illustration Mr Welsby has put of a landlord choosing at his option to give a dinner to his tenant, or of a landlord choosing at his option to employ a steward, to save himself the trouble, are both of them occasions where the expense would not be necessary for the obtaining of the money, but would be an optional expenditure, and the landlord in the case put by him would not only have “to expend” 40s. by the year, but it would be at his option either to give a dinner to the tenant, or employ the steward or not, according to his pleasure. But the revising barrister having found here that the expenditure was necessary for the collection of the rent, I consider that the party who received the 40s. minus the aliquot part of L.5, which the revising barrister has found reduced it below 40s., not to have had a freehold of 40s., whereof he might expect 40s. by the year.

CONTRIBUTORY.—*Joint Stock Companies Acts of 1848, 1856, and 1857—Husband and Wife*.—A widow who derives shares in a banking company from her late husband, becomes a registered shareholder in respect of such shares, marries a second time, and by ante-nuptial settlement made on such second marriage, agrees to transfer these shares to trustees, upon trust for herself for life for her separate use without power of anticipation, with remainder to her children by the first marriage. There is no formal notice of the settlement or marriage given to the bank, but there is evidence that they did, in fact, know of the marriage and of an intended settlement. The trustees of the settlement repudiate the trust, and neither execute the settlement nor act under it. The lady gives a written order, assumed to be signed by her in her second husband's name, for payment of the dividends to him, and this is acted upon by the bank until it fails, and the name of the lady as originally on the list of shareholders (viz., that of her first husband) remains unaltered. On the question whether, on the winding up of the bank, which is registered under the Joint Stock Companies Registration Act of 1856, either the husband or wife, or both, are liable,—*Held*, that the husband is not, but that the wife is, and that her liability is confined to her separate estate. Kindersley, V.C., in delivering judgment, observed:—Upon principles of natural justice, where a gentleman, as in this case, married a lady possessing shares, and where by the marriage settlement he was never to have any benefit from them, he ought not to be liable in respect of them. There might, however, be ground for the argument, on the construction of the Winding-up Act of 1848, that the husband would be liable. On the other hand, if a single woman was indebted, *primâ facie*, the liability devolved upon her husband when she married, during the coverture, he, by the marriage, undertaking and becoming subject to her obligations. If a single woman or a widow, as here, had, standing in her name, shares in a banking company, she was liable to pay calls and to contribute to the debts of the company; and when she married, supposing there was no settlement, the general effect, *primâ facie*, was, that the obligations which up to that time rested on her became imposed upon her husband. After reviewing the provisions of the Joint Stock Acts relative to contributories, his Honour continued:—There was, in fact, no express stipulation that a contributory should not be confined to a shareholder, but there was nothing to lead to the conclusion that any one was to be a contributory except an existing or former shareholder. It was impossible to revert to the Act of 1848, because it was expressly said that you should not. The policy of the Act of 1856 was to make the register list of shareholders conclusive, subject to ratification, and that the shareholders on that list

were the persons to be contributories. As to the subsequent Acts, they did not touch the question, only applying to registration, etc., and enacting that a company so registering was not thereby to escape from liability or lose the benefit as against any other person. Judgment against the Company.—(8 W. R. 73.)

**PACTUM ILLICITUM.**—*Covenant in Restraint of Trade.*—Injunction granted to restrain a surgeon from practising within a certain district in which he had served his apprenticeship, the application being founded on the written obligation of the party. Stuart, V.C., said, that a covenant to restrain a gentleman from practising as a surgeon was doubtless attended with great inconvenience, but the law was so well established as to giving effect to a covenant in restraint of trade when expressed in intelligible language, that, though it might be contrary to public policy, it was the duty of the Court to enforce it.—(*Giles v. Hart*, 8 W. R. 74.)

**EVIDENCE.**—*Railway—Publication of Bye-laws.*—The bye-laws of a Railway Company are public documents, and a certified copy of them is admissible in evidence under sect. 111 of the Railways Clauses Consolidation Act, upon proof that they are in the custody of the secretary. It was held also to be sufficient to prove that copies of them were affixed at the stations at which the appellant got in and got out of the train, and that the Court might from this presume publication at all the other stations.—(*Motteram v. the Eastern Counties Railway Company*, 35 L. T. Rep. 101.)

**BILL OF EXCHANGE.**—*Stamp of Wrong Denomination.*—After the passing of the 16 and 17 Vict., c. 59, providing for a uniform receipt stamp of one penny for all sums, the drawer of a bill for L.25 drew it on an old threepenny receipt stamp. Subsequently, the Commissioners of Inland Revenue affixed a proper bill stamp, under the authority of the 37 Geo. III., c. 136, s. 5, which enables them, upon payment of a penalty, to stamp bills which have been drawn upon stamps of a proper value, but of a wrong denomination. At the trial, Martin, B., held that the commissioners had power to stamp the bill, and that it was receivable in evidence, and the Court of Ex. sustained the ruling. Pollock, C.B.—The bill was originally drawn upon a threepenny receipt stamp, that being a stamp of the proper value for a L.25 bill of exchange, and afterwards the Commissioners of Inland Revenue stamped the bill upon payment of the penalty with a bill stamp of the same value. I think that in so stamping the bill they acted within the authority conferred upon them by 37 Geo. III., c. 136, s. 5. The bill had been drawn upon a stamp of the wrong denomination, but of sufficient value. It has been contended that the receipt stamp was no stamp, because the 16 and 17 Vict., c. 59, had abolished these stamps. But that was not the effect of that enactment. It substituted different duties, but did not annul existing stamps. It enables the holders of the old stamps, by the 18th section, to exchange them for new, but it does not prohibit the use of the old stamps.—(*Naiser v. Grout*, 8 W. R. 79.)

**SUCCESSION.**—*Variance—Codicil.*—Testator, by a codicil to his will, directed certain sums to be paid to his daughter Lucy, and, on the death of his widow, L.3000 in case B. should marry with her mother's consent, and with a marriage settlement containing the same conditions as were mentioned in his daughter Mrs Doveton's marriage articles. He also directed, that if his daughter Lucy "should marry and die without any lawful issue, the several sums given to her after my decease shall, after her demise and that of her husband, revert to my surviving children." On the other hand, the sister's marriage articles provided that, in case there should be no issue of her marriage, the property should be held for such person or persons as she should by will appoint. Lucy married, and on her marriage a settlement similar to that of her sister was executed.

She died without issue, having exercised the power of appointment in favour of her husband, who claimed the L.8000 by virtue thereof. On bill filed by the representative of one of the testator's children, claiming part of the L.8000, —*Held*, that as the codicil expressly provided for the contingency of failure of issue, the power of appointment given to Lucy in her marriage settlement was void. The Master of the Rolls, after narrating the facts, said—The difficulty which I feel is occasioned by the rule which usually facilitates the construction of a will, that is, that a will may be read liberally, while a deed must be read strictly. If this clause stood alone, it would seem to be clear that the same power and control which were given to Mr and Mrs Doveton, and each of them, were to be given to his daughter Lucy, and any person she might marry. On reference to the marriage articles of Mr and Mrs Doveton, I find that they have a joint power of appointment in favour of their children, with a power to Mr Doveton, in default of such joint appointment, to appoint to the children; and in case of there being no children, a power to Mrs Doveton to appoint among such persons as she should think fit. But the difficulty is, that the codicil goes on to say, "And I do also direct, that if my daughter Lucy should marry, and die without any lawful issue, the several sums given to her after my decease shall, after her demise and that of her husband, revert to my surviving children; or, in case of their death, to their nearest relatives." This is at complete variance with the limitations contained in the settlement of Mr and Mrs Doveton, in the event of there being no children; Mrs Doveton having, in such case, a power of appointment among such persons as she shall please; while here it is expressly provided, that in the like event, the property shall go over to the surviving children of the testator, or their nearest relatives. If the whole of the provisions of the articles of Mr and Mrs Doveton are to be imported into and read as part of the codicil, then Lucy, in the event of her having no children, must have power to dispose of the property as she may think fit. But the codicil expressly provides for the case of Lucy having no issue; and it is impossible, therefore, that the whole of the powers can be introduced. Either one of the powers in Mr and Mrs Doveton's articles must be omitted, or this passage must be struck out of the codicil. I am of opinion that, under such circumstances, I must give to the words of the codicil the strict literal and legal sense which they would have received if contained in a deed. I must hold that there was a joint power to Lucy and her husband to appoint in favour of children, if they had had any, similar to that contained in Mr and Mrs Doveton's marriage articles, and also a power in default to Mr Ducarel to appoint; and subject to those powers, in the event of Lucy dying without issue, the property must go to the surviving children of the testator, and to their nearest relatives.—(*Crossman v. Bean*, 8 W. R. 84.)

CONVICTION UNDER 6 GEO. IV., CAP. 129, SEC. 3.—This was a decision upon a conviction under the 6 Geo. IV., cap. 129, sec. 3, for threatening a workman. The conviction stated that A. B., unlawfully and by threats, endeavoured to force one C. D., who was then a trade workman, hired in his trade and business of a mason by E. F., to depart from his said hiring contrary to the Act. Upon this it was *held* that, inasmuch as the offence was stated in the words of the statute declaring the offence, the conviction was good under the Metropolitan Police Act (2 and 3 Vict., cap. 71, sec. 48); and, further, that, independently of that statute, the offence was sufficiently stated. The Court of Ex. subsequently, in a similar case, held the same.—(*Pearham*, 35 L. T. Rep. 91 and 106.)

RAILWAY COMPANY.—*Action by Trustees of Abandoned Undertaking*—7 and 8 Vict., cap. 110, secs. 23, 24.—Defendant having signed a subscription-deed, contemplating an undertaking requiring the authority of Parliament, and whereby he authorized the provisional directors to abandon the scheme named in the deed,—*Held* by the Court of Q. B. liable to an action by the trustees for the company, although the scheme had been abandoned; and a demand made upon him

is not a call within 7 and 8 Vict., cap. 110, secs. 23, 24; nor, at the time of action brought, need such company be provisionally registered under 7 and 8 Vict., cap. 110. Judgment of the Queen's Bench affirmed (*dissentientibus* Crowder, J., and Cockburn, C.-J., the latter now Chief-Justice of the Q. B., and not strictly entitled to decide on matters arising in error from his own Court). The opinions are based on a purely technical commentary of the Act, and cannot satisfactorily be abridged.—(*Oldham v. Brown*, 8 W. R. 91.)

**SALE.—Breach of Trust—Auction.**—The defendant and a Mr Bretherton were auctioneers, in partnership, at Birmingham, where they have a repository for the sale of horses. In June 1858 they advertised a sale by auction at the repository. The advertisement contained, among other entries, the horses to be sold as follows:—"The three following horses, the property of a gentleman, *without reserve*." One of these was a mare called Janet Pride. The plaintiff attended the sale, and bid 60 guineas for her; another person immediately bid 61 guineas. This person was Mr Henderson, the owner of the mare. The plaintiff, having been informed that the last bidder was the owner, declined to bid further, and thereupon the defendant knocked down the mare to Mr Henderson for 61 guineas, and entered his name as purchaser in the sale book. On the same day the plaintiff tendered to the defendant L.63 in sovereigns, as the price of the mare, and demanded her as being the highest *bonâ fide* bidder. There was evidence that the plaintiff had notice that the following was amongst the conditions of sale:—"Eighth. Any lot ordered for this sale sold by private contract by the owner, or advertised without reserve, and bought by the owner, to be liable to the usual commission of 2 per cent." An action of damages was brought against the auctioneer for breach of contract. At the trial a verdict was entered for the plaintiff for L.5, 5s. damages, and leave was given to amend the declaration if the Court should think fit; leave was also given to the defendant to move to enter a non-suit. The Court of Queen's Bench made the rule absolute to enter a non-suit. On appeal to the Ex. C., the judgment of the Court was delivered by Martin, B.:—"In this, as in most cases of sale by auction, the owner's name was not disclosed; he was a concealed principal; the names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be *without reserve*. This, according to all cases both at law and equity, means that neither the vendor, nor any person on his behalf, shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid is equivalent to the real value or not (*Thornett v. Haines*, 15 M. and W. 867). We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward; or that of a railway company publishing a time table, stating the times when, and the prices at which, the trains run. It has been decided that the persons giving the information advertised for, or a passenger taking a ticket, may sue, as upon a contract with him (*Denton v. The Great Northern Railway Company*, 5 E. and B. 860). Upon the same principle, it seems to us that the highest *bonâ fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts property up for sale on such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be sold, and that this contract is made with the highest *bonâ fide* bidder, and, in the case of a breach of it, that he has a right of action against the auctioneer. Nor does it seem to us material whether the owner, or a person on his behalf, bids with the knowledge or privity of the auctioneer. In either case the sale is not without reserve, and the contract of the auctioneer is broken. We entertain no doubt that the owner might, at any time before the contract is legally completed, interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment, and the subsequent revocation or conduct of the owner, he is entitled to be indemnified. We do not think the conditions of sale stated in



the case (assuming the plaintiff to be taken to have had notice of them) affect it. The third condition has nothing to do with the case; and the eighth only provides that, if upon a sale without reserve the owner acts contrary to the conditions, he must pay the usual commission to the auctioneer. For these reasons, if the plaintiff thinks fit to amend the declaration, he, in our opinion, is entitled to the judgment of the Court.—(*Warlow v. Harrison*, 8 W. R. 95.)

**PARTNERSHIP.—Liability of Shareholders.**—The ordinary Parliamentary subscription contract of a projected company for forming a railway, contained a clause empowering the provisional directors to abandon the application to Parliament. B. subscribed this contract as a shareholder. The directors afterwards exercised the power and abandoned the application. The trustees brought an action against him for calls, under the covenant. He contended that the subscription contract having been rendered unnecessary by the abandonment of the intention to go to Parliament, it was void for all purposes, and the company not being completely registered, he was not liable to calls. But the Ex. Ch. held, that he was liable upon his covenant, and that the action not being for calls, the non-registration of the company was not an exemption.—(*Aldham v. Brown*, 35 L. T. Rep. 237.)

**RAILWAY.—Lands Clauses Act.**—A railway company, under their compulsory powers, took a small strip of ground at the extreme end of a garden attached to a dwelling-house. They were held to be liable to purchase the entire house and premises.—(*Cole v. The West End, etc., Railway Company*, 35 L. T. Rep. 178.)

**BANKING COMPANY.—Contributory.**—B., a widow, had shares in a banking company standing in her name. She married C., and then the shares were vested in trustees for her separate use. One of the trustees was a leading member of the company, but all the trustees repudiated the trusts of the settlement, and the company had no formal notice of either the settlement or the marriage, and the shares remained on the books in B.'s name. She afterwards made an order in her married name of C. for payment of the dividends to her husband, and he received them under that order. It was held that she was to be placed on the list of contributories in respect of her separate estate, and not husband.—(*Ex parte Luard*, 35 L. T. Rep. 202.)

**HUSBAND AND WIFE.—Destination.**—Husband and wife joined in a mortgage of the wife's estate. The proviso for redemption directed that, "on payment," the property should be reconveyed to the husband and his heirs. Afterwards the mortgage was paid off with the wife's money, and the reconveyance was made to the husband and his heirs accordingly. It was held that such was not the intention of the parties at the time of the original mortgage, and the Court decreed a reconveyance to the wife.—(*Stansfield v. Hallam*, 35 L. T. Rep. 179.)

**ACQUIESCENCE.**—A company agreed to give to B., a shipbuilder, a direct communication from his premises to a station on the line; he constructed a tunnel to carry out this communication, and used it for two years and a half. The company then sought to withdraw the permission, but they were held to be bound by their acquiescence in his user.—(*Laird v. The Birkenhead Railway Company*, 33 L. T. Rep. 159.)

**SUCCESSION.—Assumption of Legacy.**—B. bequeathed to his son L.2000 absolutely, and gave his residuary estate to trustees to pay the interest of one-third of it to his son for life, and after his decease to his children. On his son's marriage, which took place after the execution of the will, testator settled L.2000 Bank Annuities on his son for life, then to the wife for life, and after the death of the survivor to the children. It was held by the Court of Appeal that the residuary gift and not the specific bequest was adeemed *pro tanto* by the L.2000 so settled. Until the case of *Pym v. Lockyer*, 5 Myl. and Cr. 29, it was thought that ademption, if it took place at all, must be total; but it was then settled that there might be partial ademption.—(*Montefiore v. Guadella*, 35 L. T. Rep. 251.)

THE  
JOURNAL OF JURISPRUDENCE.

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BIOGRAPHICAL SKETCHES OF THE COLLEGE OF JUSTICE.

No. I.

It would be a curious subject for a philosophical historian to investigate how often and how far our most valued privileges and most valuable institutions have owed their origin to most unlikely causes,—party spirit, the desire of self-aggrandizement, or the scarcely more reputable spirit of political ambition. To take a familiar instance within our own immediate sphere, how thoroughly was the Court of Session the offspring of a particular policy of our kings; how little did it owe its origin to any sincere desire for the pure and impartial administration of justice? The story of its establishment was somewhat on this wise. The feudal system was all-powerful in Scotland,—every social and political institution was bent to or broken before it. The Government was a complete oligarchy, and the power of the barons supreme. Perhaps no circumstance tended more to increase their power than the rights of jurisdiction, civil and criminal, which they possessed. Over their feudal inferiors these rights gave them the most absolute power, both as to persons and property; while from their feudal superior, the sovereign, they took away one of the chief sources of regal power and revenue. In none of the European states was this more manifest than in Scotland, down to and during the reign of the earlier Stuarts. Robertson, in his *History* (vol. i., pp. 12–35), explains, at considerable length and with much acumen, the various causes which led to this result. For our present purpose the fact itself is sufficient, that the judicial powers of the nobility covered the whole country with petty tyrants, and took from the monarchs all real share in the administration of justice, which has been well characterized as “one of the most powerful ties between a king and his subjects.” It is true the king had original and undisputed jurisdic-

tion within his own demesnes, but these were of very limited extent. There was also an appeal to him, or to his court, from the judgments of the barons or their courts; but somehow the barons managed to render this appellate jurisdiction almost quite nugatory, notwithstanding the endeavours of the kings to give it power and force. And it was not till 1532, when the Court of Session was instituted by James V., that any efficient check was devised on the arbitrary proceedings of the barons' courts. It is interesting, however, to trace the various steps which led slowly and hesitatingly to the establishment of a Supreme Civil Court, through which, in a degree we can scarcely understand at the present day, the unjust pretensions of the nobles were set aside, and the rights of the Crown and the liberties of the people vindicated. A few observations upon these may therefore be considered a not inappropriate introduction to some slight sketches of the Scottish College of Justice, from its institution to times "within the memory of men still living."

From the earliest period, the kings of Scotland were in use to hold courts which were attended by the peers and great ecclesiastics. There was no fixed time for holding these courts, and their composition as to members varied greatly. The business brought before them was both legislative and judicial, if indeed in the very earliest times any valid distinction can be made between these. During the thirteenth century, the King's Court took the more definite and permanent form of the Parliament: still, however, the arrangements for transacting the various kinds of business which came before it were very defective; and this want of method, combined with the opposition of the nobility, deprived the Parliament, especially in its judicial capacity, of all real power. In 1369, however, the Parliament took a considerable step in advance, by appointing two committees of its own members,—the one, "*ad ea quæ concernunt communem justitiam*;" the other containing the germ of the body ultimately known as the Lords of the Articles. James I., with the sagacity which he displayed in almost every department of public affairs, determined on still further improving the means for administering the supreme jurisdiction possessed by himself and the Parliament. He accordingly, about the year 1425, appointed the Chancellor, along with certain other persons, whom he chose from among the Estates of Parliament, to hold courts for the trial of civil causes three times in the year, in whatever place he pleased to name. The persons so chosen were called Lords of

Session. In 1457 the Lords of Session were directed to sit for forty days, three times each year, at Edinburgh, Perth, and Aberdeen ; and this provision, more economical to the country than pleasant to their Lordships, was further made that, considering the shortness of the time they were to sit (and the same persons would not be called on again for seven years), they of "their awne benevolence suld beir their awne costs." They got, however, one-half of the king's unlaw, or small fines of court, to assist in defraying their expenses. This itinerant court did not work well ; and accordingly, in 1503, it was enacted that "thair be ane consale chosen be the kingis hienes quhilk salsit continually in Edinburgh, or quhar the king makes residence, or quhar it pleases him, to decide all manner of sumoundis in civile maters, complaints, and causis, daily, as thai sal happen to occur, and sal have the same power as the Lords of Session." The judges appointed under this enactment were called the Lords of Daily Council. The co-existence of these two courts by no means tended to increase the reputation of the supreme tribunals. This may readily be believed when it is remembered that, as Mr Cosmo Innes informs us, in his recent admirable work on "Scotland in the Middle Ages," "causes that commenced in the one court frequently were disposed of in the other, while the clerks seem to have had no clear notions of the distinction between them ; and frequently, in engrossing the proceedings of the one, use the style and form of the other."

Hitherto, therefore, the efforts of the successive sovereigns to add to their own power and diminish that of the nobility, by the erection of royal courts of supreme jurisdiction, had signally failed. Not only had the royal policy been insufficient for the purpose of destroying or bringing into contempt the courts of the barons, but, by the "confusion worse confounded" which it had produced in the king's own courts, it added to the barons' powers, and enabled them to point contemptuously from the king's ill-regulated tribunals to their own, which were certainly not harassed by any conflict of jurisdiction such as we have described.

At length, in the year 1532, James V. obtained the consent of Parliament to the establishment of "ane college of cunning and wise men, baith of spiritual and temporal estate, for the doing and administracioun of justice in all civil actions," which still subsists under the more familiar title of the Court of Session. The college was to consist of a president, and fourteen Ordinary members, one

half clerical, the other lay, whilst the Lord Chancellor was entitled to sit and preside when he pleased, and the king had the right of naming Extraordinary Lords to "have voit siclik to the nomer of three or four."

Many circumstances combined to make it likely that this court would prove a more perfect tribunal than any of its predecessors. In it were united the functions both of the Lords of Session and the Lords of Daily Council (whence its Judges are to this day styled Lords of Council and Session), and all risk of conflict between two courts of co-ordinate jurisdiction was thus removed. Again, the Judges were specially named, and were to be selected on account of their ability and knowledge of law: thus the evils of a fluctuating and ignorant tribunal, previously so great, should in large measure have ceased. Nor is it to be laid out of view that a certain, though very small, pecuniary provision had been made for remunerating the Judges, and enabling them to maintain the high position which their office conferred. In the preceding year (1531), the Duke of Albany had obtained from his kinsman, Pope Clement VII., a bull directing a tax to the amount of 10,000 golden ducats (*ducatorum auri de camera*) to be raised from the ecclesiastical order, for the maintenance of the Senators of the College of Justice, which it was then in contemplation to create. The tax, as might have been expected, was keenly opposed by the clergy, headed by Gavin, Bishop of Aberdeen; but they were obliged to give way after an unsuccessful appeal to the Holy Father. The produce of this tax was so small, that in 1549 it only yielded L.40 Scots to each ordinary Lord.

Thus constituted and endowed, the new Court sat for the first time on the 27th May 1532, the king being present; and from that time to the present, its sessions have never been interrupted, except when occasionally war or pestilence was devastating the land, and from 1650 to 1661, when its functions were exercised by Cromwell's commissioners for the administration of justice to the people of Scotland.

We have noticed the various causes which conspired to render the Court of Session a more perfect tribunal than its predecessors, and a more powerful instrument in the hands of the kings for curbing the turbulence of the nobility. It cannot be denied, however, that, for a considerable period after its institution, the operation of these causes was suspended, and the royal policy frustrated. Nor is it difficult now to see what led to this unfortunate result. First,

there was the constitutional hatred of new and untried institutions, so especially powerful among a rude and ignorant people. Then both the nobility and the clergy were determined enemies of the new court; the former, because they saw clearly enough how fatal, if firmly established, it might prove to their order; the latter, because they had been taxed for its support. But last, and perhaps greatest obstacle of all to the success of the new tribunal, the Judges, instead of being selected for their judicial qualities, were generally mere political partizans, and many of them exhibited anything but a good example of obedience and respect for the laws they had to administer. This will become abundantly clear, as we now proceed with a rapid account of the more remarkable Senators of the College of Justice during the first half-century of its existence.<sup>1</sup> Here, however, it may be interesting to state the arrangements which were made for the sittings of the new court, as these are contained in the first Act of Sederunt, dated 27th May 1532. The Act, *inter alia*, contains the following provisions:—"It is devisit and ordanit . . . that settis be honestlie maid and coverit with grene claith, flokkit on the kingis expensis, quhar the Lordis sall sit; and sal be maid ane burd quadrangulare or rownd, about the quhilk thair may sit xviii personis eselie; and that thair be maid sett aboun sett, and ane bell to be hangin, to call in masaris, or parties, as the Lordis requiris. *Item*, that all the Lordis sall entre in the Tolbuth and Counsal-houss, at viii houris in the mornynge dayly, and sall sit quhil xi houris be strikin. *Item*, Alssone as the Lordis be enterit in the Tolbuth, that an maisser ische the Counsal-houss, and him self sall stand at the dur, and latt na man entre; and giff ony Lord, or uthir man, cummys to the dur, and desiris enteres, that he advertiss the Lordis thereof; and giff thai have ony matir, thai will propone, that silence be had, quhill thai have done, and than to remove. *Item*, that na man entre to pley, bot the parteis contenit in thair summondis, and thair procuratouris, giff thai will ony have." Though the hour of meeting was an early one, it cannot be said that the sederunts were long. They were doubtless, however, quite sufficient for the transaction of all the judicial business which at that early period came before the court.

<sup>1</sup> If any of our readers should wish to obtain information as to all the Senators of the College of Justice, they will find it in Messrs Haig and Brunton's Account of them—a work full of most interesting and accurate information, to which reference has very frequently been made in the composition of these sketches.

According to the Act of Institution, the following were the first Senators :—Alexander Myln, Abbot of Cambuskenneth ; Richard Bothwell, Rector of Eskirk ; Sir John Dingwell, Provost of Trinity College ; Henry White, Rector of Finevin ; Robert Schanwell, Vicar of Kirkcaldy ; William Gibson, Dean of Restalrig ; Thomas Hay, Dean of Dunbar ; Arthur Boyce, Chancellor of Brechin ; Sir William Scot of Balweary ; Sir John Campbell of Lundy ; Sir James Colville of Easter Wemyss ; Sir Adam Otterburn of Auldham ; Nicolas Crawford of Oxengangs, the Justice-Clerk ; Francis Bothwell ; and James Lawson. Schanwell and Boyce did not take their seats when the court was constituted, but at a subsequent period officiated as judges. In their place, Abbot Reid of Kinross, George Ker, Provost of Dunglass, and Sir James Foulis of Colinton, were admitted by the king.

The Abbot of Cambuskenneth was the first Lord President of the Court of Session. He was not a man of brilliant parts, or distinguished for his legal acquirements ; but he was a prelate of great zeal, and had a sincere love for learning. His correspondence with the Canons of St Victor, near Paris, on the decayed condition of Scottish learning, and his strenuous endeavours to restore it, will ever entitle him to the grateful remembrance of all who love letters and rejoice to see literary tastes preserved by men advanced to posts of great labour and high honour. Mr Fraser Tytler, in his *Life of Sir Thomas Craig*, gives the following characteristic instance of the Abbot's zeal as a monastic reformer, which has been preserved in a work written by one of his own canons :—"It had been directed by the Council of Toledo, that, in monasteries following the order of St Augustine, the Scriptures should be read to the monks during the time of dinner. Our modern prelates, says the indignant canon, whose time is occupied in the society of women and profane persons, had altogether neglected the sacred rule ; but my venerable prelate and father in Christ, to whom God grant perseverance and salvation, revived the custom. On the days when fish was eat, the Scripture was read uninterruptedly ; on other days, at the commencement and conclusion of the meal, and when the abbot himself was present in the refectory, which he ever was upon the Sabbath, and generally on the other days of the week, it was his custom to deliver a discourse, in the middle of dinner ; and that he might render the brethren attentive, he would often suddenly, and when they least expected it, command them to exhort or preach extempore : in which

number thus exercised, adds the canon, I myself, although unworthy, was often included." Abbot Myln died in 1548 or 1549, and was succeeded as President by Robert Reid, then Bishop of Orkney.

Reid was Abbot of Kinross in 1532, and under that title was admitted one of the first Senators of the College of Justice, being at the same time appointed to act as President in the absence of the Abbot of Cambuskenneth. Like Myln, he was a man of learning, and did much to advance it among his countrymen. Though a churchman and a prelate, he never displayed much zeal for his order, but was chiefly employed by his sovereign on various diplomatic missions to England, Rome, and France. Indeed, it is difficult to understand how he managed to discharge his judicial duties at all; for, especially after he succeeded to the President's chair in 1548, he was constantly engaged in some embassy or another till the year 1558, when he was sent as one of the Estates' Commissioners to witness the marriage of Mary with the Dauphin of France. This was the last of his embassies, and the ending of his life, for he died at Dieppe, on his way home, not without suspicion of having been poisoned at the instance of the house of Guise, whose enmity he had aroused by his spirited conduct in Paris. Among the many benefactions made by Bishop Reid to the cause of learning, not the least noteworthy is his bequest of 8000 merks towards founding a college in Edinburgh for the education of youth; which money, as Maitland (*History of Edinburgh*, pp. 355, 356) tells us, was laid out in the purchase of the site of the famous Kirk of Field, on which the University now stands. Bishop Reid was succeeded as President by Henry Sinclair, Dean of Glasgow, of whom we shall have to speak hereafter.

Sir John Campbell of Lundy was one of the original senators of the temporal side. As to his qualifications for the bench, nothing is known, and nothing can be said. The year after his appointment he was named Captain-General "till all the fute bands of Scotland," so that military employments were not then considered inconsistent with the judicial position any more than they have been in recent, or indeed in these present times. There is no evidence of Sir John's having ever been on active service, so that we cannot from his case draw any inference as to the effect of such plurality of functions. Sir John sat on the bench, or at least continued to be a judge, for more than thirty years, for the last five of which he was the sole survivor of the original senators.



Sir Adam Otterburn was another of the fifteen judges named in the Act of Institution. He was long King's Advocate, and, as the fashion then was, frequently obtained diplomatic employment. In 1532, when appointed to the bench, he was Provost of Edinburgh, and he held that office for many years thereafter. Sir Adam was a man of a quaint humour, as may readily be seen from the following dialogue regarding the intended marriage of Queen Mary and Prince Edward, which is preserved in Sir Ralph Sadler's State Papers (ii. 325-6) :—Sir Ralph had urged him that, "by the marriage of these two princes, this two realmes being knytte and conjoined in one, the subjects of the same, which have been alwaies infested with the warres, myght live in welth and perpetual peas. I pray, said he (Otterburn), give me leave to ask you a question ; and this was his question, in these wourds and terms which I will rehearse unto you. If, said he, your lad were a las, and our las were a lad, wold you then, said he, be so earnest in this matier ; and could you be content that our lad should mary your las, and so be King of England ? I answered, that considering the grate good that might ensue of it, I should not shew myself zelous to my country, if I should not consent unto it. Well, said he, if you had the las and we the lad, we coude be well content with it ; but, sayeth he, I cannot believe that' your nacyon could agree to have a Scotte to be Kyng of England. And lykewise, I assure you, said he, that our nacyon, being a stout nacyon, will never agree to have an Englishman to be King of Scotland. And though the hole nobilitie of the realme wolde consent unto it, yet our comen people, and the stones in the strete, wolde ryse and rebelle agenst it."

James Beaton, successively Archbishop of Glasgow and of St Andrews, was, in Nov. 1532, appointed to fill a vacancy which had occurred among the senators of the spiritual side. Like his more famous nephew, the Cardinal, he was an intriguing churchman, far more concerned with the political contests of the day than with the proper discharge of his sacred duties. He it was, who, when appealed to by Gavin Douglas, Bishop of Dunkeld, to put an end to the fray which ended in the well-known conflict called "Cleanse the Causey," as Pitscottie relates it (p. 286), "answeired him againe with ane oath, chopping on his breast, saying, 'Be my conscience, my lord, I knaw not the matter.' But when Mr Gawin hard the bischopis purgatioun, and chopping on his breast, and perceaved the plettis of his jack clattring, he thought the bischop deceived him : So Mr

Gavin said to him, 'My Lord, your conscience is not guid, for I hear it clattring.'" For the part he took in the conflict he nearly lost his life, and assuredly would have been slain in cold blood by the Douglasses, had not Bishop Gavin interposed and saved him. Such a man was not likely to prove a great ornament to the bench, yet the King advanced him to it, as we have seen.

By the Act of Institution, the King was entitled to name Extraordinary Lords to the "nomer of three or four." In 1532 he exercised this power in favour of the Lord Hay of Yester, the Lord Lindsay, and the Lord Herries. None of these noblemen made the slightest pretensions to legal knowledge, and they illustrate what was for many years a great blot on the character of the Court, and a serious obstacle to its usefulness, viz., its liability to be swamped by royal nominees ignorant of law, who were yet entitled to give their votes along with the ordinary judges. It will scarcely be believed that it was not till the accession of the House of Hanover that the King's right of appointing Extraordinary Lords was abolished. The last Extraordinary Lord, John Marquis of Tweeddale, died in 1762.

Perhaps no more striking illustration of the strange character of the times could be found than the appointment of Walter Lindsay, Lord St John, as a senator on the spiritual side. His Lordship, who was one of the Knights of St John of Jerusalem, had greatly distinguished himself "foughtin againes the Turkis in defence of the Christianes," and on his return to Scotland had been made Preceptor of Torphichen. A few years later, Sir Richard Maitland complained that,

To mak actis we have sum feil,  
 God kens gif that we keip thame weil!  
 We cum to bar with jak of steel,  
 As we wald boist the judge and fray,  
 Of sik justice I have na skeil,  
 Quhair rewle and order is away.

It could be no matter of surprise that the bar should be warlike, when an Hospitaller sat on the bench alongside of the Captain-General "till all the fute bands of Scotland," and sundry others such like.

Arthur Boyce, the brother of Hector Boece, the historian, who had been one of the senators named in the Act of Institution, but was not admitted till 1535, was probably the first man of pro-

perly legal acquirements who sat on the Scottish bench. M'Kenzie, in his *Lives of Scottish Writers* (ii. 383), tells us that he "was Doctor of the Canon Law and Licentiate in the Civil." He taught the laws with great applause, and was a man of great eloquence and erudition. Dempster tells that he wrote a Book of Excerptions out of the Canon Law; "*Scriptit*," says he, "*Excerpta ex jure Pontifico, quæ sunt veluti Paratitla*." Had there been more judges with endowments such as Boece possessed, the Court of Session would soon have become as perfect a tribunal as it promised to be when first proposed by James V. But with such colleagues as he had, his learning and ability must have proved of but little use.

Robert Galbraith, parson of Spot, appointed in 1537, is supposed to have been the collector of the decisions frequently cited in Balfour's *Practicks*, as the "Book of Galbraith." He is therefore entitled to the honour, such as it is, of having laid the first stone of that huge cairn of precedents which now lies over the body of the law in this country. He had not, however, long time to proceed with his self-imposed task, for in 1543 "he was," says Arnot (*Criminal Trials*, p. 155), "murdered by John Carkeitill and his accomplices, on account of some favour shown to Sir William Sinclair of Herdmanstoun." Two other supreme judges have been murdered in Scotland since then,—John Graham, parson of Killearn, one of the judges of the Court of Justiciary, in 1592, and President Lockhart in 1689. "All of them," remarks Arnot, "were murdered on account of causes to which they were either party or judge."

As already stated, the third President of the Court was Henry Sinclair, Rector of Glasgow, and afterwards Bishop of Ross. He had been appointed an Ordinary Lord in 1537, and succeeded to the Chair on the death of Reid, Bishop of Orkney, about the year 1559. Mr Tytler (*Life of Craig*, p. 74) calls Sinclair "the reformer of the law, and the patron of the literature of his country," and he seems well to have deserved the character thus given him. "It was by the exertions of Sinclair," Bishop Leslie, preserved by Tytler, states, "aided as they were by the co-operation of the magistrates, advocates, notaries, and others in official situations, that all those superfluous forms which gave an easy inlet to tedious litigations were at once cut off, and the system of our municipal jurisprudence restored to its ancient simplicity and purity." This is high, probably extravagant praise; but there is good reason for supposing that many of the useful statutes which were passed in and about 1555

were due to Sinclair's exertions and influence with his brethren on the bench and in Parliament. To Henry Sinclair has been ascribed the collection of decisions between 1540 and 1550, known as Sinclair's Practicks, and still preserved in manuscript in the Advocates' Library. This is, however, an error,—the compiler having really been John Sinclair, Bishop of Brechin, his brother, who succeeded him as President in January 1566, but only lived till the following April. John Sinclair had been an Ordinary Lord from 1540.

Henry Balnevis of Hallhill, appointed in 1538, was the first strong Protestant who sat on the Scottish bench. He was a man of great abilities, and from a low position rose to be Secretary of State under Arran's regency in 1543. In the conspiracy for the murder of Cardinal Beaton there is but too good ground for supposing that Balnevis joined. He entered the Castle of St Andrews with Norman Leslie and his associates, but did not actively share in the bloody deed. Having afterwards surrendered with the rest of the conspirators, he was sent with them, as a prisoner, to Rouen, where he composed what Knox (*History of the Reformation*, p. 83) calls "a maist profitabill treatise of justification." In 1556, his forfeiture being rescinded, he returned to Scotland, and took a very active part in the religious conflicts of those times. Nor was he restrained from mingling freely in public affairs, though he was restored to his seat on the bench in 1563. Judges were not then expected to keep aloof from political or ecclesiastical turmoil as they are now, so Balnevis joined heart and soul in the struggles then making by the Protestant party to obtain the ascendancy in the State. His character and conduct have been keenly censured by writers of the opposite party; and besides accusing him of having been in the constant practice of accepting bribes or largesses from the English sovereigns, they maintain, that while acting as one of the Justice General Argyll's assessors at the trial of Bothwell for the murder of Darnley, he corruptly connived at his acquittal. It is exceedingly difficult now to decide with whom the truth lies,—contemporary sources of information being so tainted by party spirit as to render any conclusion drawn from them very untrustworthy.

In the midst of senators remarkable as politicians, diplomatists, soldiers, or high churchmen, it is curious to come on one who was a lawyer only, and obliged to depend for his livelihood on the emoluments of his office. Such a one we have in John Gladstones, "a licentiate in baith the laws," who became a judge in 1542. He

had previously in 1535 been appointed, along with Thomas Marjoribanks, advocate for the "pure indigent peple" who "infestit" the king, declaring that their causes were delayed because they could not afford to pay for advocates to plead for them. The salary attached to the office of *Advocatus pauperum* was L.10 Scots, and Marjoribanks agreed that Gladstones should draw the whole. There are various other entries in the Acts of Sederunt which show that Gladstones was not in the position of almost all his brethren, to whom the salary of L.40 Scots, then payable to each of the Judges from the clerical contribution, was a matter of complete indifference. Gladstones was a man of much learning, and in one place at least received, on account of it, the curious title of "My Lord Doctor."

John Hamilton, the last Roman Catholic Archbishop of St Andrews, was, while Abbot of Paisley, one of the senators of the spiritual side, having been appointed in 1544. What Hamilton might have been in less troublous times it is difficult to say, but his temper and abilities were ill suited to those in which he lived; and there can be little doubt that it was his execution of Walter Mill in 1558 that made the smouldering flames of the Reformation burst forth with a vehemence and fury which in the end caused his own destruction. For his conduct in Mill's execution, Knox calls him "that cruell tyrrant and unmercifull hypocreit, falslie called Bischope of Sanct Androis;" and he tells us that "evin in the toun of Sanct Androis began the pepill plainlie to dame such unjust cruelltie, and in testification that they wald that his deyth sould abyde in recent memorie, thare was cassin togither a grit heipe of stones in the place quhare he was brunt." The Archbishop's people removed the stones, but they could not remove the memory of the cruel deed, which was bitterly avenged, when next year the churches of St Andrews were laid waste, and their altars and images broken in pieces by the followers of Knox. Archbishop Hamilton was a devoted adherent of Mary, and followed her troubled fortunes until on 2d April 1571 he was taken prisoner in the Castle of Dumbarton by the Earl of Lennox. After a species of trial, in which he was accused of being participant in the murders of Darnley and the Regent Murray, he was sentenced to death, and on the 5th April executed with every circumstance of contumely. Of Murray's murder, he confessed that he was an accessory before the fact; but he stoutly denied, even on the scaffold, that he had any share in Darnley's death. On this latter point the evidence is very con-

flicting; but, on the whole, the impression left on the mind is, that, situated as the Archbishop was, he could not have been wholly ignorant of the bloody plot which will for ever darken the memory of his unhappy mistress.

Sir John Bellenden of Auchinoul, who became a Judge of the Court of Session and Justice-Clerk in 1547, was a man of considerable abilities, and took a large share in the delicate transactions relative to the Queen's marriage. He was of the reformed faith, but did not escape the keen sarcasms of Knox for what he considered his niggardly conduct as one of the commissioners for modifying the ministers' stipends. "Who would have thought," asks the Reformer, "that when Joseph ruled Egypt, his brethren should have travelled for victuals, and have returned with empty sacks unto their families? Men would rather have thought that Pharaoh's pose, treasure, and gillnells should rather have been diminished, than that the household of Jacob should stand in danger to starve for hunger."

Passing by President Baillie of Provand, who was in no ways remarkable, we come to Sir Richard Maitland of Lethington, and his celebrated son, Mary's Secretary of State. Sir Richard Maitland's character is one of the most pleasant to contemplate of the whole roll of our Supreme Judges. In 1561, after a laborious life, spent partly in legal pursuits, partly amid the more enticing avocations of a poet, he became blind at the age of sixty-five. Most men would have succumbed under so great a misfortune. Not so he, for in the same year he accepted office as an Ordinary Lord of Session, and actually collected the decisions of the Court down to 1565. Nor did he give up his more elegant labours, for many of his most agreeable poems were written in extreme old age. Mr Tytler points out what is certainly a singular coincidence, that more than a hundred years before Milton wrote his great epic, Sir Richard Maitland, another blind poet, had chosen the same subject, entitling his poem "On the Creation and Paradise Lost;" but "here," adds the historian, "the similitude ends, and in the abrupt versification and homely narrative of the muse of Maitland, it may be believed there is little that recalls to our recollection the majestic composition of Milton." Sir Richard died in 1586, at the age of ninety, having well earned the character given of him in an ancient epitaph, as a "maist unspotted and blameless judge, ane valiant, grave, and worthy knight."

His son William, better known as the Secretary Lethington, was a man of a very different character. Educated as a lawyer at some

of the foreign universities, Lethington possessed qualities which might have made him one of the greatest ornaments of the bench, to which he was promoted in 1566. But his ambitious mind desired a wider sphere of action, where his talents for negotiation, his commanding eloquence, and his marvellously subtle intellect, might gain him that power and influence which he coveted. His success was splendid, and might have been permanent, but unfortunately his moral qualities were far inferior to his intellectual endowments. As Robertson, who greatly admired him, says (i. 184), "his address sometimes degenerated into cunning; his acuteness bordered upon excess of subtlety and refinement; his invention, ever fertile, suggested to him, on some occasions, chimerical systems of policy, little suitable to the genius of the age; and his enterprising spirit engaged him in projects vast and splendid, but beyond his utmost power to execute." In not a few points his character and career remind one of Bolingbroke's; and in this they were alike, that the glorious promise of their youth was unfulfilled, and their last days embittered and disgraced, from the selfish use they had made of their splendid abilities. To trace the career of Lethington would be to write a history of the most stirring times Scotland has ever seen. We shall not attempt it, but must leave this magnificent spirit, stained by the blood of Rizzio and Darnley, at last quenched miserably in a squalid prison at Leith.

It does not say much for the moral character of the public men of these times, that, on quitting Secretary Lethington, we have to turn to Sir James Balfour of Pittendrich, who became sixth President of the Court of Session in 1567, having been an Ordinary Lord of the spiritual side, as parson of Flisk, from 1563. Sir James' first public appearance was as one of the assassins of Cardinal Beaton; and being taken prisoner along with Norman Leslie, Knox, and others, he was sent to France, being confined in the same galley with the future Reformer. But it was not in Balfour's nature to be long attached to any party. Accordingly, when he got back to Scotland, he espoused the side of the Queen, and became so obnoxious at Court, that he narrowly escaped perishing along with Rizzio. His concern with Darnley's murder has been but too well established. From that time on to his death, in 1583, he was constantly shifting from one side to another, but always taking care "not only to preserve his own vessel from being destroyed in the storm, but to collect riches and honours from the shattered wrecks

around him." (Tytler's *Craig*, p. 98.) A man more flagrantly destitute of principle is scarcely to be found in history; yet riches flowed in upon him, and offices of the greatest honour and influence were in his possession or at his command. As a lawyer, however, it cannot be denied that Balfour has some claims on our respect. Admitting that he was not the author of Balfour's *Practicks*, which has been traditionally ascribed to him, there can be little doubt that he contributed to the design, and largely to the materials of the work. He was also one of the most active and indefatigable of Bishop Lesley's Statute Law Commissioners, of whom we shall presently have to speak. One is glad to find a redeeming feature in the character of a man otherwise so corrupt.

We come now to notice John Lesley, parson of Oyne, and afterwards Bishop of Ross. Lesley studied canon and civil law for several years at the French universities, and obtained the degree of Doctor of Laws in Paris. After spending several years, partly in ecclesiastical, partly in diplomatic employment, he was, in 1564, admitted an Ordinary Lord of Session, and took his seat on the bench accordingly. Though a zealous churchman and a keen politician, Lesley, with that honesty and earnestness of purpose which distinguished him through life, immediately set about the efficient discharge of the duties of his new office. The statutes of Scotland were then in much confusion, and few, if any, knew which were obsolete and which in *viridi observantia*. Perceiving this, Lesley obtained from Queen Mary a commission to himself and the most eminent lawyers of the time to examine, revise, and publish the "laws, constitutions, and ordinances" of Scotland, from the *Regiam Majestatem* and *Quoniam Attachamenta* down to the date of the commission. The project was admirable, but it should have been carried out with deliberation, considering the great importance of the work undertaken. Precipitancy, however, was Lesley's failing; and so he procured, that within six months of the date of the commission, the volume of the Acts of Parliament commonly called the "Black Acts," from their being printed in the black Saxon character, were printed and ready for use. Much of the value of this collection is lost from the haste with which it was prepared, but it will ever remain a monument of Bishop Lesley's zeal for the public service. It is, however, in connection with his beloved mistress, Queen Mary, that Lesley will be longest remembered and admired. He remained faithful to her through every step of her unhappy career, undergo-



ing immense toil, imprisonment, risk of death itself, for her sake. When separated from her during her captivity in England, he composed for her use a treatise in Latin, with which language she was quite familiar, entitled, "*Piæ afflicti animi consolationes et divina remedia.*" Even Spotswood admits that these "Consolations" are full of "learning and piety," and to Mary they were peculiarly grateful. But Lesley did not confine himself to ministering religiously to his unhappy mistress. He went from court to court, endeavouring to induce the Catholic princes of Europe to interpose on her behalf; nor did he cease from these labours till the Queen's cruel death rendered their prosecution useless. Lesley died at Brussels in 1596, having exhibited throughout his long life one of the noblest examples of devoted and chivalrous loyalty which history anywhere presents. The works he has left behind him prove his high classical attainments, his philosophic spirit, and great piety. In fine, no Scottish prelate has earned a fairer fame than Bishop Lesley of Ross.

Adam Bothwell, Bishop of Orkney, took his seat on the bench as an Ordinary Lord in 1565. In 1567 he married Mary and Bothwell, and, strange to say, two months after he crowned James VI., then a mere infant, anointing him and putting "the Crowne Royall upon his head, with all due reverence, ceremonies, and circumstances requisite and accustomed." He was afterwards "delated for not visiting the kirks of his country but from Lambmess to Hallowmess. *Item*, that he occupied the room of a Judge in the Session, the sheep wandering without a pastor. . . . *Item*, because he solemnized the marriage of the Queen and the Earl of Bothwell, which was altogether wicked, and contrair to God's law and the statutes of the kirk." He submitted to the discipline of the kirk, and was restored to the ministry. Bishop Bothwell was one of the commissioners who accompanied Murray to York in 1568, and is even said to have himself handed in the writing accusing Mary of the murder of Darnley. The subsequent events of his life, down to its close in 1593, it is not necessary to mention.

David Chalmers of Ormond was made a Judge of the spiritual side in 1565. In 1567 he was so deeply implicated in Darnley's murder, that he was named, along with the Earl of Bothwell, Sir James Balfour, and "black Mr John Spens, the principal devisers thereof," in the famous placard which was fixed to the door of the Tolbooth. He fled for a time, but returned to Scotland, where he remained till Mary was deposed. He then took refuge in Spain,

and, as Tytler says, "amused his years of banishment in composing memoirs in French upon the history and constitution of Scotland." Being at length allowed to revisit Scotland, he again took his seat on the bench, and kept it till his death in 1592. Chalmers was a man of scholarly attainments and much legal learning, but his usefulness was in great measure destroyed by his fatal complication with the murder of Darnley.

We have not thought it necessary to notice the Extraordinary Lords, as their connection with the Court was so very slight and temporary. An exception must, however, be made in the case of Edward Henryson, a very learned civilian, who received his appointment as Judge in 1566. Henryson received the degree of Doctor of Laws from the University of Bourges, "where," says Dr McCrie, "he studied under Equinar Baro, one of the first civilians who had recourse to the pure sources of ancient jurisprudence, and who blended polite literature with the pursuits of their immediate profession." The effect of Baro's teaching was conspicuous in Henryson's after career, for he was not less distinguished as an able civilian than as a lover of classical learning. He resided abroad for many years, during part of which he taught civil law in his Alma Mater. After his return to Scotland, he filled various public offices with much success, and in particular superintended the publication of that edition of the Scots Acts which was the result of Bishop Lesley's commission already mentioned. It is not known with any certainty when Henryson died; but he left behind him, both in Scotland and on the Continent, a high reputation as a juris-consult and a man of letters.

John Maitland, afterwards Chancellor, was nominated a Judge of the Court of Session in 1568. He was the younger brother of the Secretary Lethington, and enjoyed a large share of the family talent. He had not the brilliant parts of his brother, but was a man of far greater integrity, and one who truly and honestly served his king and country. As in the case of the Secretary, so in that of the Chancellor, to sketch his career would be to write the history of his times; therefore we shall not attempt it. Like his father and brother, he was a poet, a man of varied learning and great eloquence. His sagacity in the management of affairs was very great, and he did much to bring Scotland at least to the beginning of less troublous times. Such a man should have lived to a good old age,

and been able in the evening of life to look back with pleasure and satisfaction on the successful labours of his prime. But it was Chancellor Maitland's misfortune to serve a mean and foolish prince, who treated him with ingratitude and unkindness. The Chancellor's sensitive nature was quite unsuited for such treatment, and he died in 1595 at the age of fifty. One is glad to hear testimony such as the following borne to Maitland's character by such a man as James Melville: "He was a man of grait larning, wisdome, and stoutnes, and kythed in end to have the feir of God, deing a guid Christian and lovar of Chryst's servants."

Robert Pont, who in 1572 was appointed a Senator of the College of Justice, was a man of considerable mark in his time. He was one of the leading reformed ministers, his influence in the General Assembly being very great, or at least as great as the very independent character of that body would allow. It was with the consent, if indeed it was not on the nomination of the Kirk, that Pont became a judge; and yet in the following year he was "delated" before the General Assembly for non-residence, and failing to visit the churches in Moray, of which he was commissioner. The Reverend House must have been quite aware that Pont's duties as a judge would interfere with his ecclesiastical functions; but whilst they permitted him to undertake the former, they would suffer no "diminution in his tale" of the latter. Pont himself was a man of very liberal sentiments, though he was a conscientious and fearless professor of the reformed faith. He was also a man of great literary acquirements, besides being, what was then of far rarer occurrence, addicted to astronomical and mathematical studies. Truly, when one thinks of Pont in his various capacities as an ecclesiastical leader, as a judge, and as a man devoted to learning and science, the suspicion will intrude itself, that, great and good man as he was, the churches of Moray did run considerable risk of being unvisited, and the Assembly was probably quite right to take him to task therefor. This, however, by the way, and without a shadow of desire to take from Pont any portion of his fame.

John Lindsay, parson of Menmure, became an Ordinary Lord in 1581, and, after having acted on various parliamentary commissions, was in 1592 appointed by James VI. "Master of the Metals," an office then created by him with a view to deriving a revenue from the Scottish mines. It does not appear that any great addition was made to the contents of the royal coffers by the Master of the

Metals, notwithstanding his "qualification" for his new office. The precious metals have always been found in Scotland in small quantities, but never to an extent to render their working profitable. In 1596 Lindsay was appointed one of the Octavians, as they were called, to whom James delegated very extensive powers of government. He would seem to have been a man of much learning and sagacity, and James Melville goes so far as to call him, "for natural judgment and learning, the graitest light of the polecie and counsall of Scotland."

David M'Gill of Nisbet became Lord Advocate and an Ordinary Lord of the Court of Session on 27th June 1582,—a conjunction of offices which seems strange to our modern ideas, but was by no means uncommon in the early days of the Court.

But now we have reached, in our sketches of the Judges, the fiftieth anniversary of the institution of the Court. Here for the present we pause. Except in a very few instances, but for the statement that in such and such a year the individual under consideration took his seat on the bench, the cursory reader of the preceding pages would have found it difficult to discover that the persons passing in review before him had been the chief judges of this land. A motley host they were,—soldiers—churchmen—diplomats—politicians—everything but lawyers. The scene, however, or rather the character of the *dramatis personæ*, will change as we proceed, and as we come nearer settled and peaceful times.

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## COLLATION BETWEEN HEIR AND EXECUTOR.

### No. II.

#### I. *Collation not a right of the heir.*

IN a former article on this subject,<sup>1</sup> it was shown that an heir's right to a share of *legitim*, or of intestate succession (that is, of dead's part), in no case arises from his character as heir, but solely from his possessing the additional character of child or next of kin. Collation, therefore, is not a right or privilege belonging to an heir, but an obligation or condition which may be pleaded against him in exercising his rights as a child or next of kin. As an heir, however, when claiming moveables, is invariably called upon to collate, the claim and the counter-claim have come to be looked upon as one

<sup>1</sup> See December No. of *J. J.*

transaction, which, from its most striking feature, has been designated *collation*; and seeing that the heir has alone power to give rise to this transaction, he is said to have right to *collate*. The name of the counter-claim has thus come to be applied to the claim. This form of expression, so vague and inaccurate, is all the more objectionable, that it harmonizes with and seems to sanction the theory, that the right to demand moveables is a privilege of the heir *qua* heir—a theory to which the expression probably gave rise. It is necessary to take notice of this, as the theory in question leads to practical results quite inconsistent with the principle now recognised; and the inaccurate expression not only occurs in the Moveable Succession Act, 1855, but is used there in a way which seems to give the erroneous theory considerable countenance. (In what follows, the term *collation* will be used in its strict sense.)

## II. *Who are entitled to call upon an heir to collate.*

When an heir claims legitim as a child, or moveable succession as a next of kin, or the representative of a next of kin, under the Moveable Succession Act, 1855, no one can call upon him to collate the heritage who has not right to a share of such legitim or moveable succession.

### 1. *When an heir claims legitim.*

1. If the heir is an only child, he can never be called on to collate in claiming *legitim*, because he has right to the whole of it.

2. If the heir, not being an only child, is at the date of his father's death the sole surviving child, he is entitled to the entire *legitim*, and therefore cannot be called on to collate even though the predeceasing children have left issue. The same result follows where there are surviving children, if they have discharged their right to *legitim* during their father's life. In that case, they are held to be non-existent *quoad legitim*.

3. If at the date of the father's death there are children entitled to *legitim*, any discharge of such right afterwards does not operate in favour of the heir; but the father's executor or general donee, who has the right to such renounced share, may call upon the heir to collate as the child might have done.

### 2. *When an heir claims dead's part.*

1. If the heir is an only child, besides the *legitim*, he is entitled

to the whole dead's part ; and therefore cannot be called on to collate by his father's widow.

2. If the heir is an only surviving child, he may be called on to collate by the issue of the predeceasing children of his father, as they have right to a share of dead's part under the Moveable Succession Act, 1855.

3. Generally, an heir claiming as a next of kin may be called on to collate by any of the parties entitled, under the Moveable Succession Act, 1855, to share in the deceased's intestate succession.

In the case of a brother's succession, an heir may thus be called on to collate by his father, or, if his father has predeceased, by his mother.

### III. *What heirs must collate on claiming moveables.*

1. No person can be called on to collate who is not an heir-at-law of the person whose moveable succession he is claiming.

A younger son, therefore, cannot be called upon to collate, though he may have derived heritage from his father.

2. If a next of kin is heir-at-law, he may be called upon to collate, though the heritage may have come to him, not as heir-at-law, but by conveyance or destination, provided that the heritage would have devolved upon him as heir-at-law, had there been no deed regulating the succession.

If an eldest son succeeds as heir of entail to his father, he must collate his interest in the entailed estate, if he claims a share of his father's moveable succession ; but a second son succeeding as heir of entail to his father is not required to do so, as he is not the heir *aliocuin successurus*.

3. An heir-at-law is not bound to collate heritage if the person whose moveable estate he is claiming was not infert, but possessed on apparenay ; because, in such case, the heir takes up the heritage from the person last infert.

4. Heirs portioners are heirs-at-law ; but as they succeed equally to heritage and moveables, there is no room for collation between themselves. If, however, an heir portioner claims moveables along with other next of kin who are not heirs portioners, she must collate her share of heritage.

5. An heir of conquest is an heir-at-law, and may be called on to collate. There may thus be two persons collating in one succession—the heir of conquest and the heir of line—each bound to collate

that heritage which falls or might have fallen to him as heir-at-law. An heir of conquest cannot be called on to collate heritage which, had there been no destination, would have fallen to the heir of line, and the heir of line cannot be called on to collate conquest that may have been conveyed to him by the deceased.

#### IV. *What heritage must be collated.*

The rule may be stated generally, that an heir-at-law is bound to collate all the heritage derived by him by succession from the person whose moveable succession he is claiming, and in which that person was vested.

*Heritage not vested in deceased.*—Heritage which was possessed by the deceased on apparency merely, need not be collated, because the heir may take that up as heir of the proprietor last infeft.

*Præceptio hæreditatis is a succession.*—Heritage which the heir has received from his father during his life is held as succession, under the doctrine of *præceptio hæreditatis*. The nature of this doctrine is thus laid down in the joint opinion of Lords President (Hope), Balgray, Gillies, Mackenzie, Corehouse, and Fullerton, in *Anstruther v. Anstruther*, 20 January 1836, 14 S. 272 : “The doctrine of *præceptio* runs through the whole law of succession ; for if the real estate, or any part of it, is propelled by the ancestor during his lifetime to his heir *alioquin successurus*, without a valuable consideration, the subject so taken shall be accounted inheritance, and to a certain extent shall infer representation and liability for debt. It constitutes a succession, and not a gift, and is no contravention of a prohibition to alienate under which the ancestor may have been laid. In accordance, therefore, with this rule, of universal application, and without any reference to equity in the particular case of collation, the heir must communicate what he has taken *præceptione*.”

*Entailed estate.*—An entailed estate must be collated,—that is, all the advantages which the heir derives from it must be communicated by the heir to the other next of kin. This was finally decided in the case *Anstruther v. Anstruther*, 20 January 1836, affirmed in House of Lords 16 August 1836, 2 S. and M.L. 369.

*Foreign heritage.*—Heritage situated in a foreign country must be collated. The doctrine of collation being part of the law of moveable succession, the heir cannot refuse to comply with the condition of collation, on the ground of the heritage not being in this country.

V. *Mode of collation.*

1. *When there is legitim and no dead's part.*—In cases where a father has left a testament, there can be no difficulty, as there is then no room for collation except in regard to legitim. The heir may as a child repudiate the testament, and demand a share of legitim. If he is the only child entitled to claim legitim, he cannot be called on to collate by any one. If other children are entitled to legitim, he may be called on to do so, either by them, or, if they approbate the testament, by their father's executor in their right. The collation brings into one mass the legitim, and the heritage or its value; and the heir is entitled to draw such share as he would have done had the other children claimed.

2. *Where there is dead's part and no legitim.*—In cases where there is no legitim in existence, but *dead's part* only, the heritage is in collation massed with the moveables, and the whole divided according to the law of intestate succession.

3. *When there is both legitim and dead's part.*—(1.) If the heir and the *whole* other children are entitled to claim both legitim and intestate succession, the collated heritage (if any) will, as in the former case, be added to the moveables after *jus relictæ* has been deducted, and the whole will be divided again into legitim and dead's part. The legitim will then be divided among all the children in the usual way, giving effect, of course, to the rules of *collatio inter liberos* in ascertaining the share of each child. The increased dead's part will be divided equally among the children.

(2.) If the heir alone is entitled to legitim, other children having renounced it during their father's life, he cannot be called on to collate in claiming it; but if he claims a share of dead's part, he may be called on to collate. The question then is, How is this collation to be effected? Is he bound to collate the entire heritage with the dead's part alone; or is he entitled to collate the heritage with the legitim and dead's part together, before drawing the legitim, thus securing half the heritage as legitim, and only sharing half with the next of kin? This is a point of some difficulty, on which there does not seem to be any authority. The next of kin might plead, that the heir, as a child, is entitled to take the legitim without collating; that it vested in him absolutely at the date of his father's death, in addition to the heritage; that no question of collation can therefore be raised *quoad* legitim; that the dead's part falls to be divided among the next



of kin as such ; that the heir, if he claims as next of kin, must do so on the condition of collating the heritage, in the same way as if this had been an uncle's succession ; that in this question, legitim cannot possibly come into view ; that the only question to be considered is, What heritage has the heir derived from his father ?

On the other hand, the heir might plead, that though heir, he is entitled by law to renounce that character, and betake himself entirely to his rights as a child, and a next of kin ; that the only condition imposed upon him is to collate, or to convey the entire heritage to the executor ; that there is no principle that can compel an heir to take up the character of heir to his own injury ; and that, accordingly, he is entitled to waive his right, and allow the whole estate to be dealt with as if it had been wholly moveable. The argument of the next of kin seems to be sound upon the principles of collation ; but there is great reason for holding that an heir may, if he chooses, surrender the heritage entirely, so as to obtain the result he seeks, though this surrender may not be strictly a collation.

(3.) If the heir is entitled to legitim along with another child, while other children have renounced legitim during their father's life, the heir may be called on to collate by the one child in claiming legitim, and also by the whole other children in claiming dead's part.<sup>1</sup>

(a.) *If the heir claims both.*—When he claims legitim, the child entitled to legitim may plead, that the legitim is his *legitima portio*, and that the heir cannot share it without collating the entire heritage. The heir, on the other hand, might answer, that he is entitled both to a share of legitim as a child, and to a share of dead's part as a next of kin ; and that the heritage, being renounced by him, must go to increase the legitim and dead's part jointly ; that if he were bound to collate the entire heritage with the legitim, he might also be called on to collate the whole of it with the dead's part. The heir's answer seems to be a conclusive one against such a demand, either on the part of the child entitled to legitim, or of the next of kin, when he has renounced the entire heritage, and conveyed it to the executor. Having done so, the other children cannot treat him as an heir thereafter. But if the case *Fisher's Trs. v. Fisher*, 5 Dec. 1850, is to be relied on, an heir may be in a very

<sup>1</sup> The case is the same where there are several children entitled to legitim, provided there are others entitled to dead's part only.

different position : so far from renouncing the heritage, he may have merely offered to collate the *value* of the heritage. In such a case, it appears to be clear that the child entitled to legitim may call on him to collate the entire value of the heritage with him alone, because it is collateable heritage in the hands of the heir-at-law. Any collation of value with the next of kin is an independent transaction, which cannot affect *legitim*. The next of kin, in like manner, might insist on a collation of the full value with them also. The best course for the heir in this case, therefore, is to renounce the entire heritage *ab initio*, and allow it to increase both legitim and dead's part.

(b) *If he claims legitim only.*—It may be for the interest of the heir to claim a share of legitim with one child, and not to claim dead's part, in consequence of the number of children entitled to it with whom he would have to collate. The question then is, What must he collate? The child entitled to legitim might, as in the former case, call upon him to collate the entire heritage; and the heir's answer might be, as before, that he is willing to allow the legitim to be of new estimated, adding the heritage to the legitim and dead's part, but that he cannot be called on to collate the entire heritage with the legitim only. To this the child might reply—that before the heir can claim legitim, he must collate by conveying the whole heritage to the executor. To this the heir might answer, that according to *Fisher's Trs. v. Fisher*, he is not required to do more than allow the full value of the heritage to be added to the moveables, and allow his share to be estimated on that footing, that on that calculation his claim for legitim is so much. To this it might be answered, that the heir must collate the entire heritage with some one; that so long as any part of the heritage remains in his hands, any one entitled to plead collation is entitled to say, "Collate that with me,—it is heritage,—and it came to you by succession from your father." This last principle seems to be a sound one. If the heir conveys the entire heritage to the executor, he can hold up clean hands, and claim either legitim or intestate succession, or both; but nothing less will do. It may therefore be for the heir's interest to collate the entire heritage with the child claiming legitim; but he cannot be forced to do so: he may, if he chooses, renounce the whole heritage in favour of the executor. On the other hand, the other child may suffer by compelling him to do so. This case is evidently one for compromise.

(c) *If he claims dead's part only.*—The same principles apply in this as in the former case, and a similar mode of settlement seems desirable.

Having now seen the practical difficulties which emerge in the application of the rules of collation in certain cases, and having found principles which seem to afford a solution of them, it may be desirable, in conclusion, to state these clearly. They are,—

1. That an heir may *ab initio* renounce the entire heritage in favour of the executor, so as to throw it into legitim and dead's part jointly.

2. That in every act of collation, an heir must collate the whole heritage.

If these two principles are granted, the chief difficulties disappear. On the one hand, the heir-at-law will not have that character thrust upon him to his prejudice, when he is willing to renounce it, and all its privileges; and, on the other, children entitled to legitim, and next of kin entitled to dead's part, will be entitled to plead to their fullest extent the strict principles of collation against a competing heir-at-law.

The practical result of these principles is, that an heir-at-law being a child or next of kin, has the choice of two modes of obtaining a share of the moveable succession.

1. He may at once renounce his right as heir-at-law, and insist upon the abandoned heritage being divided into legitim and dead's part, as if it had been moveable property. He will thus prevent all questions of collation from emerging. Or,

2. He may retain his character as heir-at-law, and offer to collate the entire heritage, or its value,

- (1.) With the other children entitled to legitim, if he claims it; and,

- (2.) With the other next of kin, if he claims dead's part; so that if he claims both, he will have to collate the value of the entire heritage twice over.

These propositions may appear novel, but they seem to follow inevitably from the two principles above set forth. The only question is, whether these are well founded.

1. That an heir may *ab initio* renounce the entire heritage in favour of the executor, so as to throw it into legitim and dead's part jointly.

This proposition, though not expressly stated by our law writers,

seems to lie at the very foundation of the doctrine of collation, which, Erskine (III. 9, 3) says, "was admitted into our law, that the heir might in no event be in a worse condition than the other next of kin." That the heir has right to abandon the heritage in favour of himself and the other heirs in *mobilibus*, will probably be admitted. But it may be objected, that legitim being a fixed share of the *moveable* property, and being once ascertained, cannot have heritage thrown into it in this way by an act of the heir. Now, in answer to this objection, it may be observed that the law of legitim was derived from the civil law, which did not recognise a distinction between heritable and moveable property. In this country the distinction is made by the feudal law cutting out heritable property from the operation of the civil law. The law of legitim, therefore, is not restricted *by its own nature* to moveable property; but by the interference of the feudal law. It is further to be observed, that the demand for collation which children and next of kin are entitled to make against an heir, is very much of the nature of the plea of *approbate* and *reprobate*. They are entitled to say to the heir, "You cannot be allowed to demand your rights under the civil law of succession, while you exclude its operation in regard to the heritage, by using your feudal right." The heir is entitled to say, "I *approbate*;" and the distinction between heritable and moveable is no longer known.

2. That in every act of collation the heir-at-law must collate the whole heritage, or its value.

This is the strict principle of collation, and there appears to be neither principle nor authority for its limitation in any case.

M. R.

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#### EQUITY v. COMMON LAW.

(*From the Solicitors' Journal.*)

THAT "they order these matters better in"—Equity, can hardly fail to occur to any unprejudiced person who compares the working of our two systems of procedure, especially in their application to the questions and exigencies of the present day. In spite of Common Law Procedure Acts, equitable defences, powers of granting injunctions, discovery, and the like, so liberally bestowed upon common law courts by recent legislation, they intrench themselves within

their traditions, and seem astute to avoid anything like an equitable—may we not say a common sense?—interpretation of their statutory powers. The Bill of the Lord Chancellor, if passed into law, will go far towards an entire destruction of all equitable jurisdiction, and may, therefore, well excite apprehension even amongst those law reformers who have most earnestly advocated fusion. No doubt, the Courts of Equity have not been eager to improve some of their recent opportunities for enlarging their jurisdiction. There has been no anxiety for the strife and excitement of trial by jury. The stirring conflicts of cross-examination have few charms for men who have sat at the feet of Lord Eldon. But whatever shyness may have been shown in these particulars, Courts of Equity have not failed to adapt themselves to the requirements of the age, and in many instances have exercised a sound common sense in their decisions, which contrast favourably with the more technical views still adhered to on the other side of Westminster Hall. A recent case, arising under the Patent Law Amendment Act, will, we think, afford some illustration of our meaning.

An action was brought by the Patent Type Founding Company against Mr Walter, the chief proprietor of the *Times*, and Mr Lloyd, of *Lloyd's Weekly Newspaper*, for alleged infringements of a patent for type which was based upon a peculiar chemical composition. From the very nature of the patent, the question of infringement could not be determined without a chemical analysis of the type used by the defendants, innocently no doubt, but still supplied by manufacturers against whom proceedings for an alleged infringement were pending. The plaintiffs had, some months before commencing the action, succeeded in obtaining from the *Times* office a specimen of type, which was sent to the late Mr Henry, the analytical chemist, to be analysed. That gentlemen stated to the managing director of the plaintiffs' company, as the result of his analysis, that the type was made according to their specification; but before making any formal written report he died. After commencing the action, the plaintiffs applied in Chambers, under the Patent Law Amendment Act (15 & 16 Vict., c. 83, s. 42), for liberty to inspect the type used at the *Times* office, and, if necessary, to take specimens, in order to obtain by analysis specific proof of infringement. An order was granted, but for inspection only, which was of course useless to the plaintiffs, as by a mere external view of the type, they could never ascertain its component parts—the whole

question in dispute. The matter was brought before the Court of Exchequer (see *The Patent Type Founding Company v. Lloyd*, 6 Jur. N. S. 103), and solemnly argued. The ghost of Surrebutter, if it ever revisits that temple of Themis, must have chuckled at the turn taken by the discussion, and thought that some of the right old stuff had still survived to these degenerate days. What is "inspection?" was the key-note. Johnson and Webster were cited to show that "inspection" was not a mere visual scanning, but a "prying examination," and again, a close survey "for the purpose of ascertaining the quality and condition." But the Court declined to take judicial notice of Johnson or Webster. Inspection, no doubt, could be granted under the Patent Law Act, but it must be inspection *pur et simple*, and nothing more. Analysis implied destruction, and at that the judges stood aghast; they conjured up the picture of a world deprived of its *Times* by a holocaust of type made by ruthless plaintiffs armed with the powers of the law to examine and destroy. "I can find no authority," said the Chief Baron, "for saying that the Court of Chancery would make such an order as is here asked, which is not merely for an inspection of the suspected article, but for an analysis of a portion of it, and which consequently involves the destruction of so much as is submitted to analysis." So the rule was discharged; and the plaintiffs must have submitted to an infringement of their patent rights from having the means of proving such an infringement virtually denied to them, had not those much maligned Courts of Equity been still in existence and open to do justice.

A bill was accordingly filed to restrain the *Times* from infringing the plaintiffs' patent; and on the last seal day of the sittings (March 26), an application was made to V. C. Wood for liberty to inspect and remove for the purposes of analysis a portion of the type used in printing the *Times*. The application was opposed, not upon the etymological grounds which prevailed in the Exchequer, or upon want of jurisdiction in the Court to make the order, but upon delay, and also by the argument that the motion must fail, being for an inspection which was merely in aid of proceedings at law. The order, however, was made without the reply being heard. His Honour did not seem to have been impressed with the ruinous results of the analysis sought by the plaintiffs which had so appalled the learned Barons of the Exchequer. He took, if we may say so without presumption, a plain common sense view of the matter.

There was not much authority upon the point, to be sure ; but even if there were less, in the case of a patent requiring chemical analysis, the Court in granting inspection would proceed to make that inspection effectual by ordering defendant to deliver up to the plaintiff some small portion of the article alleged to be pirated—care being, of course, taken, that the interests of the defendant were not thereby damaged. The quantity actually to be delivered for the purpose of analysis was, in the present case, some sixpennyworth, for which the plaintiffs would undertake to give a fair compensation.

After reading this case, and contrasting with the timid and narrow interpretation put upon the Patent Law Act by the Court of Exchequer, the simple, straightforward way in which the Vice-Chancellor—without laying any particular stress upon precedents—arrived at the justice of the case, we may well pause before we assent to the revolutionary scheme proposed by the Chancellor for entirely destroying our expansive system of equitable jurisprudence, and reducing suitors to the Procrustean model which obtains in the courts of common law. The Patent Law Amendment Act, as expounded by Lord Campbell in *Holland v. Fox*, 3 Ellis & B. 977, was intended “to vest in the courts of common law, in which actions for infringement of patents may be brought, the power to order an injunction, inspection, and account, heretofore exercised by courts of equity ; so that suitors may be saved the vexation, delay, and expense to which they had been exposed in being obliged to go to a Court of Equity for an injunction, then being sent to law to establish their legal right by an action, and then being compelled to go back to equity for full redress. The court in which the action is commenced may now, by its own authority, do complete and final justice between the parties by this combination of judicial power.” An instance of how far these intentions have been carried out in practice, is afforded by the case of the Type Founding Company. The result speaks for itself. Until the judges have been educated into equitable views, and induced to rely less upon their narrow traditions through which the statute law is made of none effect ; until a careful revision has been made of our whole law, we think, with the Master of the Rolls and the Vice Chancellors who have signed the “Observations” upon the Law and Equity Bill, that “no attempt should be made to alter our tribunals.”

## THE MONTH.

The Lord Advocate on Law Reform—The Social Science Association—Titles to Land Bill—Business of the Courts.

WOULD it be a compliment, or a cruel mockery, to inquire of that distinguished pluralist, who combines in his person the functions of secretary of state for Scotland, public prosecutor, and metropolitan representative, whether he had enjoyed the leisure of his Easter recess? So far as the Lord Advocate is concerned, it would perhaps be more correct to speak of the Parliamentary session in London as the vacation—the period in which he matures his measures, with the view of submitting them to his constituents in Edinburgh, on whom the duty of ultimate assent or rejection would seem to devolve. Assuredly his Lordship's office was no sinecure during the week which he spent in Edinburgh, prior to the reassembling of Parliament in April. First, he had a field-day with the Aberdonians at the University Commission; then a regular badgering from his constituents on that grand stock grievance of the annuity-tax. Having passed successfully through this purgatorial discipline, we next find him in the character of a popular favourite, discoursing eloquent music on the theme of Parliamentary Reform; and, we are not sure if he was not let in for a share in the inaugural festivities connected with Mr Gladstone's installation. In the midst of these and a multiplicity of other public duties, it speaks well for the courtesy and good nature of the Lord Advocate, that he found time to deliver a lecture to the representatives of the mercantile classes in Edinburgh, on the subject of law reform. But, doubtless, he must have felt that after receiving so many lectures from their school on the same subject, he was under an obligation to give them one in return. In England there have been lectures from learned personages on this fertile topic; but these were usually delivered to learned bodies, bearing such forbidding titles as "Incorporated Law Society," or "Association for the Promotion of Law Reform." We think the Lord Advocate has chosen a wiser course. The demand for law reform proceeds from the people rather than the lawyers; and, as the people are for the most part profoundly ignorant on the subject, it is well that they should be enlightened. We know no one who is better qualified to play the part of popular instructor, on such a subject, than Mr Moncreiff.

It was scarcely to be expected that the lecturer could deal satis-



factorily with the multiplicity of topics to which allusion was made in his address to the Trade Protection Society. Without detracting from its merits, as a whole, we would say that it is chiefly to the observations on questions connected with the transference of land, that the public will look with interest. Our readers will remember that two months ago we announced that Government would, in all probability, attempt some further reforms in this direction, and it is satisfactory to learn that the Lord Advocate has resolved to tread in the path already marked out by Rutherford and Inglis. The eulogium which Mr Moncreiff passed on these veteran pioneers was graceful as it was well-merited; and he may rest assured, that if he succeeds in completing the work so fairly begun, his name will be handed down with theirs as a benefactor to his country. But it is just as well to remember that every expedient which ingenuity could suggest, has already been put in practice with the view of mitigating the two great obstacles to the free transferences of land. Lord Rutherford's admirable Act makes entails absolutely defeasible by any heir in possession born after the passing of the Act; and the Lord Justice-Clerk's Act has reduced the feudal investiture to a mere shadow of its ancient proportions. It is not by clipping and paring at descriptions of subjects, or by shortening clauses till they are neither intelligible nor grammatically accurate, that reform can now proceed. Total abolition, and not amendment, is what is really required. Without disturbing the rules of family succession, entails might be abolished altogether, seeing that they no longer answer the objects originally contemplated. Without disturbing the theory of the feudal system, an end might be put to the present absurd investitures, at the same time establishing the superior's dues on a safe footing. On this subject some useful practical suggestions will be found in a letter from an old correspondent, which we print in another page. At present we shall not resume the subject; but, we venture to hope, as the Lord Advocate has informed us that he is studying Bentham, that his measures may be marked by that breadth of view and practical tendency which distinguished the speculations of that illustrious thinker.

While on this subject, we would call attention to the efforts that are being made to found branch societies in Scotland, in connection with the Social Science Association. The proceedings of this body ought to be peculiarly interesting to the legal profession; and, we trust, when the annual meeting takes place in Glasgow, that

Scotchmen will show themselves not insensible to the meritorious efforts of the promoters of this great national organization.

In our observations last month on the Titles to Land Bill we omitted to take notice of a point which has given rise, and, as we think, very justly, to great dissatisfaction amongst the country practitioners. We allude to the provisions for perpetuating and extending the monopoly of the town-clerks in taking infeftment. Clauses 4, 7, and 8, appear at first sight to be the most objectionable. When the old law, which required infeftment to be taken by delivery of sasine, was in force, the town-clerks had the exclusive right of expeding instruments of sasine of burgage property, whether proceeding on absolute dispositions or on dispositions in security. But when the Heritable Securities Acts of 1845 and 1847 abolished the instrument of sasine as applicable to securities, it was at once seen that the preservation, or rather the re-establishment, of the town-clerk's privilege with relation to notarial instruments under these Acts, would nullify the main object of the Legislature; and, accordingly, the business of taking infeftment on securities, by whatever form, was thrown open to the profession. We are at a loss to know why the precedent of the Heritable Securities Act has not been followed in this bill; and still more surprised to find that in section 8 an attempt is even made to restore the monopoly of the town-clerks, in completing infeftments upon heritable securities. Section 4, which provided for taking infeftment on a *part* of a deed by recording a notarial instrument; and section 8, which provides for the completion of the title of a general disponee, are precisely similar to clauses 2 and 12 of Lord Advocate Inglis' Act, with this important difference, that in the latter the notarial instrument may be expedite by any notary, while in the present bill the right of expeding such instruments is given exclusively to the town-clerks. Then, in clause 7, the old system of expeding an instrument of cognition on the part of heirs-at-law is continued, for no other reason that we can discover, than to give the town-clerks the monopoly of preparing such instruments. Under the provisions of the Titles to Land Act, 1858, and the Service of Heirs Act, an heir to lands not held burgage might complete his title by recording the decree of special service, obtained on application to the Sheriff. There is no reason why these provisions should not be extended to burgage tenures. An heir frequently succeeds to lands held both

feu and burgage ; and it is most unjust that he should be put to the expense of two services, when the only legitimate object of this clause could be attained by requiring the decree of service, or an extract thereof, to be recorded in the Burgh Register of Sasines if necessary. The clause is also objectionable, as requiring a proof of propinquity in all cases ; whereas, under the present practice in Glasgow, and, we believe, in other burghs, a general service before the Sheriff is equivalent to a service by ward of Court. Clause 23 is the most objectionable in the whole bill, providing as it does for the payment of *the same fees* to town-clerks for recording a conveyance which they have hitherto received for *preparing and recording* an instrument of sasine. Now, even assuming that these gentlemen are entitled to some compensation for the loss of privileges, surely some abatement ought to be made on the score of their exemption from personal labour and responsibility in connection with this branch of their duties. If the town-clerks are for the future to be paid for doing nothing, at the same rate which they now receive for doing something, it is easy to see who will be the gainers by the change. Further, it will be seen, by reference to our observations on the 4th and 8th sections, that these gentlemen are to have a right of exacting fees which, by the Heritable Securities Acts, was expressly taken away ; because, throughout this bill, infestments on heritable securities are dealt with on the same footing as infestments on irredeemable conveyances ; and one might suppose that the framer of the bill had never heard of notarial instruments under these statutes. The whole structure of the bill is rotten to its foundation. Town-clerks are regular legal practitioners, performing ordinary professional business. The burgh is no doubt the principal client in most cases, just as there are agents whose principal client may be an extensive landed proprietor, and whose principal business consists in renewing investitures to the vassals of this magnate. To many of this class of agents the Act of 1858 entailed a considerable loss ; but it was never contemplated that they should receive any compensation. They were willing to sacrifice a portion of their professional emoluments for the public benefit, believing also that the simplification of titles would indirectly benefit themselves by increasing the number of transmissions ; and unless the town-clerks are willing to act in the same liberal spirit, it were much better that the bill should be delayed until public opinion is strong enough to enforce a satisfactory settlement.

From our reports in another page, it will be seen that the Lord Chancellor has been displaying his wonted energy in reducing the arrears of business in the House of Lords. Such another clearance has not been made since the period of Lord Brougham's Chancellorship; and if the present energetic spirit is continued, the roll will be entirely cleared off before the expiry of the present session. The House of Lords has never been stronger in point of ability than it is at present; and if it adds to its other virtues that of punctuality and despatch, it bids fair to become the most popular tribunal in the kingdom.

The Rolls of the Court of Session for the Summer Session show a more equal distribution of the business than we have been accustomed to; but they do not give promise of a steady diminution of arrears, unless the plan which we have repeatedly urged upon the attention of the profession be honestly carried out. That plan, we need hardly say, is the very obvious one of holding extra sessions, as the Judges are bound in honour and in duty to do, for the disposal of the arrears in their ordinary Rolls. At present, the First Division has 65 cases in the Short Roll, and the Second Division has 44; and experience entitles us to say, that the end of the Summer Session will bring no material diminution in the number of cases ready for hearing. Now, were each of the Divisions to sit for a month, in the long vacation, and to dispose of *one cause* per day, which is not an unreasonable allowance, more than half of these arrears might be cleared off; while the Rolls would at the same time be reduced to such dimensions, as would entail a delay of not more than three months to the suitor, instead of the wearisome interval which has been in use to elapse between the presentation of a reclaiming note and the decision of the case. We regret to observe, that the rolls of two of the most popular and hard-working of the Outer House Judges are also so long as to preclude the possibility of speedy decisions,—Lord Kinloch having 46 cases, and Lord Ardmillan 55; and we regret still more to learn, that the remedy of a statutory transference of causes, the adoption of which in the Divisions has given such general satisfaction, is not likely to prove satisfactory if extended to the Outer House. At any rate, the change, if made at all, must be made with caution and discretion; because an impression is gaining ground, that a reduction in the numerical strength of that tribunal is the proper way of increasing its efficiency.

## Legal Intelligence.

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DO THE DECISIONS OF THE HOUSE OF LORDS BIND THE HOUSE ITSELF?—In the Windsor Charity appeal, which has occupied the House for the last ten days, the Attorney-General was commenting on the well-known Beverley case, and questioning its principle, when the Lord Chancellor, addressing Sir Richard, said, "Mr Attorney, it is quite open to you to distinguish your case from that of Beverley. But the doctrine laid down in the Beverley case, whatever that doctrine may be, as conclusively binds this House as it would any inferior tribunal. I have always understood that such was the constitutional law on the subject." The Attorney-General: "I am very glad to hear your Lordship say so. Another noble and learned Lord has intimated a contrary opinion,—holding that this House is no more bound by its decisions than an inferior Court is by its own adjudications." The noble and learned Lord referred to by the Attorney-General is doubtless Lord St Leonards, who has affirmed more than once that "the House ought not to persevere in error." We believe Lord Campbell's view is the correct one. The theory of the Constitution is, that the ultimate appellate jurisdiction is infallible. It cannot err. Its decisions are to be obeyed, not criticised. The well-known case of *Reeve v. Long* (Salk. 227; 2 Cruise's Dig. 336) is in point. There the reversal by the Lords was against the opinion of all the judges. A General Act was passed (10 and 11 Will. III., c. 16), altering the law laid down by the House. The principle on which the Act proceeded was, that what the Court of last resort decides, however inconvenient or unjust, is *law*, and to be set right only by Parliament. Hence, even where the Law Lords differ in opinion, where they are equally divided in giving judgment, and where, consequently, as some may irreverently imagine, the soundness of their final determination may be questioned, it will nevertheless be as good law as if the Peers had all cordially concurred in voting it. Thus, in the *Queen v. Millis*, 10 Cl. and Fin. 534, Lord Lyndhurst, Lord Cottenham, and Lord Abinger, were of one mind; Lord Brougham, Lord Denman, and Lord Campbell, of another. The decision was said to have been but a *negation*, proceeding upon the ancient rule of the law *semper præsumitur pro negante*. But the Court of Exchequer, in the case of *Catherwood v. Caslon*, 13 Mee. and Well. 261, treated this as a light mode of dealing with a judgment of the House of Lords. They looked to the result, and there they found that the House, *as a House*, had given a judgment; and then they said, by the mouth of the learned Baron Parke, "that authority binds us." The contrary doctrine, Lord Campbell holds, would endanger titles. Notwithstanding all this, it must be owned that one or two well-known decisions of the House have been tabooed by the profession, but not by holding them to be bad law, but by making out invariably that they have no application to other cases. It will be found, however, that the House itself has never revoked what it has once deliberately laid down on an appeal or writ of error. Suppose the Lords were now, in 1860, to entertain misgivings respecting the principle on which they decided the great Bridgwater case in August 1853, is there any power short of a statute that could alter the law of that celebrated adjudication? And is not the House itself as much bound to conformity as the other courts of the country? This is a question which ought to have been authoritatively and conclusively determined before now. Indeed, the larger question of the value and obligatory character of former decisions by the same tribunal, or by tribunals of concurrent or higher jurisdiction, remains to the present day very indefinite, and is therefore estimated very much according to the peculiar views of individual judges on the subject.

## New Books.

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*Principles of the Law of Scotland.* By GEORGE JOSEPH BELL.  
Fifth Edition. By PATRICK SHAW, Advocate. Edinburgh :  
T. & T. Clark.

It is much to be regretted that no published memoir exists of the eminent professor to whom Scotland is indebted for the consolidation, and in no slight degree for the construction, of her mercantile laws. We are not without hope that our biographer, who in another page has brought to light some fragments of the history of the earlier luminaries of the law, may yet be enabled to do justice to the memory of one whose authority stands higher than that of any judge of his time, and yields only, if it yields at all, to that of another untitled and unrewarded labourer in the same field, Professor Erskine. But we, who are not biographically inclined, and who are stimulated to research by no stronger motive than curiosity respecting the history and career of an eminent scholar and thinker, have not succeeded in laying our hands on the materials wherewith to satisfy our "thirst for information." No legal periodical has embalmed his memory in an obituary notice. The local newspapers, albeit not unused to descant on the virtues and the services of ex-Sheriffs and other minor celebrities, take no notice of the greatest legist of his time, except to record the date of his decease, and the vacancies thereby created in the chair of Scots Law and the Clerkship of the Court of Session. The *Gentleman's Magazine* is silent as to his name and lineage. The various biographical encyclopædists, from Chambers to Vapereau, have been consulted in vain. The *Encyclopædia Britannica* alone bestows a passing notice on his memory, mentioning in a few brief lines the dates of his birth and death, the names of his principal works, and the offices which he held. The editor of the present edition informs us, that "George Joseph Bell was born in Edinburgh on the 26th of March 1770. On the 19th of November 1791 he was admitted to the Bar; and unanimously elected by the Faculty of Advocates, on the 2d of February 1822, Professor of the Law of Scotland in the University of Edinburgh. The motion was made by John Clerk of Eldin, then Leader of the Bar, and was seconded by Sir Walter Scott."

Such is all the information we have been able to glean regarding the personal history of the man whose works are perhaps

more extensively read, cited, and consulted, than those of all the other writers on our municipal law taken together. Doubtless he was a studious man, given to books rather than to active life, and it may be that there is not much of an eventful character for his biographer to record. This, however, we know, that while he sat at the clerk's table in the Court of Session, his works were appealed to by the bar as authorities, and cited with approval by the men, his nominal superiors, who then occupied the bench; and that his Commentaries in their *ipsissima verba* are still regarded as the latest and most authoritative exposition of the established principles of the law of this country.

*The Principles of the Law of Scotland*, a new edition of which is now offered to the public, was the last publication to which Professor Bell set his hand. A great portion of those valuable observations on the mercantile law, which formed the staple of his Commentaries, were here exhibited in a condensed and methodical form; and his labours were extended by the application of the same searching analysis to those departments of law which had been left unexplored since the time of Erskine. So great is the value that has been set on this work, that it has now become the standard text-book for examination by all the professional bodies, and as a work of general reference it stands unrivalled. Mr Shaw thus details the history of this famous book: "Soon after Professor Bell's election to the Scots Law Chair, he issued, for the use of the students, 'Outlines' of his lectures. In 1829 he was induced to give them more extensive circulation by publishing them, under the title of '*Principles of the Law of Scotland*.' He dedicated the book to the students, expressing a 'hope that it would render their study of a very difficult science more easy, by supplying them with a brief statement of the leading rules and exceptions, and a correct list of the authorities relied on in support of the several propositions, or useful in illustrating them.' This, which forms the first edition of the work, contained only about nine hundred sections; but it was greatly enlarged in the second edition, published in 1830, which embraced upwards of two thousand four hundred sections, and a large additional number of authorities. The popularity and the utility of the work were shown by a new edition being called for in three years thereafter; and this was followed by the publication, in 1839, of a fourth edition."

A new edition has been demanded for some time to meet the necessary wants of the profession. Something more was wanted, however, than a mere reprint of the former edition. *Bell's Principles*

is the book to which every one turns not only for the latest statement of the common law, but also for the latest decisions bearing on any question in dispute. It was therefore of essential importance, that in this work the references to other works of authority should be completed in a satisfactory manner; and we believe the public will consider the name of the editor, Mr Shaw, a sufficient guarantee for accuracy in this respect.

We are glad to acknowledge, that in all the leading requisites of editorial duty, Mr Shaw has acquitted himself faithfully and satisfactorily. He has not only improved the index and contents, giving in the latter an analytical table of the subjects of each paragraph, thus immensely improving it for purposes of reference; but he has enriched the work itself with a large number of well-selected references to decisions, so as to preserve its character as a useful practical work. Paragraphs have been also added where necessary, explanatory of the leading provisions of recent statutes, such as the Joint Stock Companies Act, the Service of Heirs Act, etc. These are distinguished by letters appended to the number of the paragraph. So far as we have observed, the new matter relates entirely to statutory law, a limitation of which we entirely approve.

The transpositions necessary in the sections are very few; and we may add, that a table is appended exhibiting the new and the old numbers in parallel columns. We understand that no alteration whatever has been made on the text beyond the omission of one or two obsolete passages; and as in other respects the utility of the work has been much enhanced, and the printing and paper are all that could be desired, we can confidently recommend the new edition as being in every other respect worthy of the support of the profession.

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*A Compendium of English and Scotch Law*; stating their differences.

By JAMES PATERSON, M.A., of the Middle Temple, Barrister.  
Edinburgh: Adam and Charles Black.

It was the boast of the citizens of the great Italian empire, that they carried their civil institutions into every country which the genius of conquest or colonization had brought under their sway; thus making amends, by the introduction of beneficent laws and a vigorous administration, for the havoc which their armies had wrought. The policy of the English constitution has rather been to leave every country brought within its pale to develop its own system of laws, trusting that time, and the influence of sound prin-



ciples of jurisprudence, would effect a gradual assimilation in the doctrines, if not in the theory, of the various systems. It is, in some respects, a disadvantage that our supreme tribunals should be called to administer as many distinct systems of law as there are dependencies in the British empire. Yet, on the other hand, we can scarcely be sufficiently grateful to the British Parliaments of the last two centuries, for their resistance to the centralizing tendencies of those statesmen who imagined that English laws and usages were the only models worthy of imitation by the rest of mankind. It is no disparagement to the English law of 1860, to say that the English law of two centuries ago was as remarkable for its purely local character and spirit, as the great Italian system was remarkable for its cosmopolitan spirit and flexibility. Those absurd distinctions between law and equity; that astounding superstructure of technical phraseology by which the Statute of Uses has been nullified, and the strange confusion betwixt public and private wrongs, all of which enter largely into the general system of English jurisprudence, have been the incubus of every code that has imbibed the spirit of the English system. Thus, while the Scotch jurisprudence has, without doing violence to its leading principles, been slowly accumulating by "accretion" from the wealth of other codes, borrowing precision from England, breadth of view from America, and logic from France, the English jurisprudence has been forced to submit to a succession of painful operations in the shape of statutory amendments, consolidations, and declaratory laws, in its career of improvement. So it is, however, that on different roads, and by different modes of progression, the two systems are tending towards a common goal. Every statutory change, and almost every judicial innovation in the established customs of either country, will be found, on strict inquiry, to resolve into an approximation to the law as it exists in the sister kingdom. This mutual rivalry, in which each nation seeks to strengthen its native institutions, by the adoption of principles of proved utility from the neighbouring kingdom, furnishes a valuable stimulus to improvement, while it gives to the law reformer the confidence arising from experience under varying conditions. The gradual assimilation of the laws of England and Scotland, which was begun within the present century, is not unlikely to be brought to a satisfactory conclusion within a much shorter period than has already elapsed in its history. But no conclusion can be regarded as satisfactory which is based on the principle of making us proselytes to the law of England. The approximation must be by force of mutual attraction,—not by gravitation to a centre.

We have often thought that no class of persons could be better qualified, by training and experience, to write a treatise on general law, than the leading counsel of the English Chancery bar. The number of English families that are dispersed in foreign countries, the complex relations of mercantile business, and the facilities afforded by British law to foreign denizens,—all these causes combine in giving rise to questions depending on the ascertainment of foreign law; and on which the English barrister is frequently required to form an opinion. Moreover, the ultimate appeal from every court in Her Majesty's colonies and foreign possessions, lies to the Judicial Committee of the Privy Council at London,—a jurisdiction vastly more comprehensive than that of the Supreme Court of the United States, and extending to a greater variety of laws and usages than all that come within the cognisance of the courts of the entire area of continental Europe. It is true that the halls of this great cosmopolitan tribunal are but sparingly frequented; for a fight in "the cockpit," as it is termed in the colonies, is regarded as the certain harbinger of ruin to one, if not both of the adventurous litigants. But then there is also the Scotch and Irish business of the House of Lords, which must familiarize the practitioners in that Court with a system of law widely different from that which they are accustomed to practise. With such qualifications for the task, it is certainly not creditable to the industry of the English bar, that they should have left the field of international and public law altogether unexplored.

It must be no easy matter for the judges of the House of Lords, to hold an even balance betwixt the English and Scotch laws, whilst, on the one hand, English cases are being cited to them every day as authoritative decisions on points peculiar to the Scotch system, and, on the other side, counsel from Scotland still patriotically insist on the recognition of their national right to have a point which has been settled one way for Englishmen, decided in exactly the opposite direction for Scotchmen. This jealousy of innovation from the House of Lords is a grievance of very old standing, and has occasionally taken a somewhat ludicrous form; as, for instance, when Lord Hermand, indignant at some decision of Lord Eldon's, relative to a stipulation in a lease, demanded, from his seat on the bench, Whether, if the tenant had undertaken to *hang himself* at the expiration of his contract, whether the House of Lords would enforce *that*? Lord Eldon's good-humoured expostulations, in answer to this rather unjudicial demand, seem to have had a sooth-

ing effect on the temper of the Scotch judges; and accordingly, though some old fogies will occasionally mutter a "nolumus leges Scotiæ mutari," when the authority of "another place" is invoked to settle a knotty point of law, yet we are free to admit that by the bulk of the public, as well as the legal profession, the decisions of the supreme tribunal are held in as high esteem as those of the most eminent of our national judges. All that was wanting to prove the groundlessness of the assertion so often made, that the House of Lords is in the habit of Anglicising our national laws, is a good epitome of the English and Scotch legal systems, exhibiting the points of difference, and marking out the boundaries which have been laid down by judicial decisions.

This is indeed the least important of the uses for which such a manual is required. Other purposes of a practical nature will already have suggested themselves, in connection with our remarks on the practice of English and Scotch law. To Parliamentary solicitors, and counsel engaged in Scotch appeals, nothing can be more embarrassing than the necessity of having constantly to refer to nice distinctions between the laws of the two countries, without the aid of any work of reference, in which the two systems are actually compared. The great and increasing use of English cases, for purposes of reference in the Scotch Courts, has made a knowledge of English law equally essential to the Scotch practitioner.

It is satisfactory to know, that a comparative estimate of the English and Scotch legal systems has at length been undertaken, and that the task has been accomplished by a gentleman, whose professional acquaintance with both systems qualifies him, in an especial manner, for the study of this branch of comparative jurisprudence. Mr Paterson, although not a professed disciple of the Scotch law, is well known to our profession as the editor of the very excellent Reports of Appeal Cases which are published in the *Scotish Jurist*; and whatever scepticism may exist on this side of the Tweed regarding the competency of English lawyers in general to appreciate the peculiarities of our law, it is impossible to deny that Mr Paterson possesses the merit of a thorough knowledge of this part of his subject, and the ability to handle it in a comprehensive and satisfactory manner. Of the author's qualifications, as an English lawyer, we do not profess to judge; but it is fair to conclude, that one who has so thoroughly imbibed the spirit and mastered the technicalities of a foreign code, will not prove an untrustworthy guide within the limits of that province which is more peculiarly his own.

The plan which Mr Paterson has followed, made it necessary that he should adopt one or other of the two systems which he expounds as the basis of the text, leaving the other to be dealt with as notes ; and we think he has judged wisely in giving especial prominence to the law of England. To have merely stated the laws of the two countries in opposite pages, and in the technical language peculiar to each, would have given no information to the student, beyond what is to be obtained from a comparison of the text-writers of the two countries. The real difficulties which beset the Scotch lawyer in the study of English treatises are, first, that he cannot tell whether any given principle in that code with which he is familiar, has a counterpart in the law of England ; and, secondly, assuming that he discovers nothing analogous to the principle in question in the English works, he is still left in doubt whether this principle (which does not appear to be adopted in England) is expressly *negated* by the theory of that law, or whether it is simply inapplicable and incapable of being predicated either affirmatively or negatively. In order to bring the points of comparison to a direct issue, our author seems to have taken a hint from the Scotch system of pleading ; and has made out something like a "record" of English and Scotch law, as it were by condescendence and answers. Avoiding those branches of the law which are entirely similar in both countries, he enters minutely and systematically into all the discrepancies betwixt the two systems, and begins by stating the law of England in a series of categorical propositions, either affirmative or negative, as the case may require. To each proposition a note is appended, embodying the Scotch doctrine on the point, which, in most instances, is indicated briefly by the word "*contra*," followed by such qualifications or explanations as may serve to exhibit the *rationale* of the law on that point. The general arrangement of the subject is adapted to the elucidation of both systems ; and the use of technical phraseology is avoided as far as possible. Thus the lawyer is enabled at a glance to ascertain the limits within which the two systems run parallel, and to steer clear of misleading analogies on points at which there is a divergence.

We think that the value of Mr Paterson's work would have been materially enhanced, if it had been made to embrace not only the points in which the two systems differ, but also those in which they agree. It is easy to say, that if the point is not noticed in the volume, we are to take for granted that the laws are identical. But we lawyers are not in general inclined to take matters for granted until they are proved ; and we would like to have some tangible

evidence of the fact that Mr Paterson's attention had been expressly directed to the particular point in dispute, rather than rest satisfied with a general and sweeping statement, that all doctrines not embodied in his book are common to both countries. Caliph Omar would not interfere to save the Alexandrian Library from the flames, because, if the books were agreeable to the doctrine of the Koran, they were unnecessary; while, if they differed from it, they were pernicious, and ought to be destroyed. To some such dilemma we must be brought, if we admit the general assumption of Mr Paterson, "that the laws of the two countries are the same in substance, except where the contrary is here expressly stated" (p. 11). Either we should at once prepare to burn the entire library of Scotch law literature, and henceforward to compile our papers and prove our arguments from English law books alone, with the help of Mr Paterson's table of differences; or, if we are still to make use of our native professional literature, it must be as important to be able to say with confidence of any particular proposition in Scotch law that it holds good in England, as it is to say of another proposition that it is at variance with the law of England. Considering that Mr Paterson has been able to compress the whole of his able and elaborate statement of differences into a volume of 600 not very closely printed pages (of which at least a fourth part is occupied with reprints of Acts of Parliament, and a glossary of terms), we may fairly assume that the points of agreement, when exhibited on a commensurate scale, would not have increased the bulk of the volume by more than one-half; and, assuredly, no reader would have grudged the price of this additional matter, which would have immensely increased the value and utility of the work. A complete compendium of English and Scotch law in a thousand pages! No possible pocket "Blackstone," or "Handy-book" on anything, could be half so useful to the public and the profession.

We shall not now attempt anything like a detailed criticism of Mr Paterson's Compendium, for the obvious reason that detail is impracticable in dealing with a work which is necessarily of a somewhat abstract character, and so comprehensive in its range of subjects as to embrace the whole circle of public and private law. The arrangement adopted will be best understood from the author's own account of it, which we extract from the introductory chapter:—

Part I. treats of Real Property, subdivided into the various heads of Crown Rights, Freeholds, Copyholds, Estates Tail, Estates for Life, and all those miscellaneous rights which naturally belong to things real. Part II. treats of Personal Property, including the subject of Contracts, Mercantile Law, and such Rights of the Person as do not fall under other heads. Part III. treats of Suc-

cession, subdivided into Wills and Executors, and into Intestacy or Descent, and Administrators under the Statute of Distributions. Part IV. treats of the Domestic Relations, subdivided into Parent and Child, Master and Servant, and Marriage. Part V. treats of Public Law, embracing Crimes and Criminal Procedure, Church, Poor-law, Public Burdens, and matters more or less affecting the public. Part VI. treats of Courts and their Procedure, embracing the Division of Courts, their Jurisdiction, Forms of Actions and Suits, and their Steps. Part VII. treats of several international questions of Law arising between Parties in England and Scotland, with observations as to the conduct to be pursued by a party not resident in the country where he seeks his remedy.

Then follows a series of extracts from Acts of Parliament relating to mixed questions of English and Scotch law. This part of the work is very incomplete. For example, it contains a reprint of the Act 17 and 18 Vict., cap. 34, which enables the superior Courts of the United Kingdom to issue process to compel the attendance of witnesses out of their jurisdiction; but does not notice the series of statutes (one of them passed as late as last session) relative to the examination of witnesses in commission out of the jurisdiction. We do not make this remark in the way of censure; on the contrary, we are glad that paper has not been wasted in printing every statute which could be brought to illustrate so comprehensive a scheme. But we do not think it was worth attempting to do that which the author must have seen he could not accomplish in a satisfactory manner. The Dictionary of Parallel Terms in English and Scotch Law is a most valuable feature in the work, as it not only supplies a great body of curious information, but also, when rightly used, furnishes a key to all English law books, by putting the Scotch practitioner in possession of the appropriate heading under which he may consult the index of any English work for the information of which he is in quest.

We have no hesitation in recommending Mr Paterson's Compendium both to the lawyer and the law reformer. No lawyer in mercantile and general practice should be without a copy, and no amateur legislator should advance a step without consulting its pages. The profession in Scotland, we are sure, will be the first to acknowledge its merits. For the information of those in England to whom such a work may be useful, we may mention that the Scotch department of the work has been most carefully revised by a gentleman in this city very well qualified to undertake that duty. We are satisfied, from a careful examination of its contents, that on every point of importance the latest and most authoritative decisions have been embodied in the Notes on the Law of Scotland; and we do not doubt that the work will be referred to as a safe and reliable guide on all questions of Scotch law that can be of interest to the English practitioner.

## Correspondence.

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### LAND RIGHTS.

*To the Editor of the Journal of Jurisprudence.*

EDINBURGH, April 1860.

SIR,—Notwithstanding what has been already done and is about to be done by the Titles to Land Bill at present before Parliament, for the purpose of facilitating the transference of land, it is almost universally acknowledged, that something further is required in the same direction. It seems also to be pretty generally felt, that the transference of land can never be so free as it ought to be, until the relationship at present subsisting between superior and vassal be changed or modified.

Concurring in these views, I would suggest that it should be enacted, with reference to *feus* to be hereafter granted, that these should not be liable for any *casualties* of superiority—that the holder of the feu for the time should be under no obligation to enter with the superior, and that the subjects, and the owner thereof, should only be liable to pay to the superior the feu-duties, or sums expressly stipulated for in the feu-rights.

With reference to *feus* already granted, it is of course necessary to deal cautiously, as vested rights have been thereby created. But even with reference to these, it seems desirable that the rights and obligations of the parties should be defined and regulated, especially with reference to the sums payable to superiors on the entries of heirs and singular successors. Where the entry-money is not fixed, the vassal should have it in his power to have the amount fixed; and in all cases where the amount is, or shall be fixed, the vassal should be entitled to redeem the entry-monies; and after redemption thereof, there should be no further obligation to enter with the superior.

The right of an heritor to obtain a valuation of the teinds of his lands, and to redeem the same, is analogous to what is above proposed with reference to entry-monies.

The redemption of the entry-monies payable to superiors has already been advocated in your pages. It might either be effected by an increase of the annual feu-duty, as has been proposed, or by a single payment, which many would prefer, or it might be left, in the ordinary case, in the option of the vassal to choose either of these methods. In the case of entailed superiorities, the first method would be the preferable one.

There is another point to which I would beg to draw attention. Hitherto heritage could not, and still cannot, be carried by a mere will. This is likely to be altered very soon; and this very naturally gives rise to the reflection—Has the time not fully come when the *law of deathbed* ought to be altered? I think it has, even though heritage should continue to be intransmissible by a mere will, and much more so when it becomes transmissible by will, like personal property. Why should a settlement which is perfectly effectual in regard to any amount of personal property, be reducible on the head of deathbed in regard to heritage? The reason of the thing is now a thing of the past; and it appears to me, that it is full time that “reduction on the head of deathbed” were numbered amongst the things of the past also. This would also be a step in the assimilation of the laws of Scotland and England—the law of deathbed having no place, I believe, in the law of England.—I am, Sir, your obedient servant,

I. E.

## PRINTED RECORDS IN COURT OF SESSION.

*To the Editor of the Journal of Jurisprudence.*

It has been more than once observed that there exists no regulation for checking the accuracy of the prints laid before the Judges of the Supreme Court, and on which alone they are left to form their judgment.

The only check which presently exists is that of opposing Agency; but for this there exists no remunerating fee, and therefore, it is a duty not necessarily done.

The Record is printed from copies often several times passing through the ordeal of transcription, and frequently the work of apprentice hands. If even Holy Scripture, in this process of transcription, has given rise to various readings and conflict of theological opinions, how much more should this liability to error exist in the transcription of law papers!

The inaccuracy of prints in the Court of Session has more than once called forth the animadversion and censure of the Judges; in fact, a collection of such blunders might form an amusing volume. In a leading case which settled an important point in the law of possessory judgment, a quotation from one of these title deeds in process was *erroneously* quoted, a plea of law founded thereon, fully pled and deliberated on, until fortunately it was discovered that the whole was founded on no firmer a basis than a misprint.

The matter has become of very serious import by the new form of process, which requires proofs in Sheriff Courts no longer to be written by a Clerk, but in notes taken by the Judge himself. These notes, as may be well expected, are far indeed from specimens of excellence in penmanship. Frequently they contain contractions, the key to which is confined to the Court in which the process depended. Often the Procurators are at a loss to discover the correct reading, except by spelling out the context, and we are not sure but the writer himself would sometimes be at a loss to discover the exact tenor of his manuscript. This mass of hieroglyphics is put into the hands of some juvenile, who corrects, to the best of his ability, the unintelligible chaos into plain running hand. After two or three filtrations, it passes at length into the hands of the printer; and, on being compared with the last edition, but seldom or ever with the original, it is presented to the Court as the very notes of the evidence. It may be thus easily seen how the omission of a single word—the negative particle or such like—or the substitution of one little word for another, may wholly terminate the evidence. In these circumstances, it is well worth considering whether a regulation might not be enacted that the proof sheets of evidence should be revised and certified by the Judge who wrote the notes thereof. Perhaps the Records and other writings might, in the same way, be compared and certified by the Clerk either of the Supreme or Inferior Courts. In this, or in some other mode, there would, with little trouble, exist a guarantee for accuracy, which at present is wholly wanting.

JURIDICUS.

## APPEALS IN THE HOUSE OF LORDS.

THE CALEDONIAN RAILWAY COMPANY, *Appellants*; v. SIR NORMAN MACDONALD LOCKHART, *et al.*, *Respondents*.—March 23.

This was an appeal from a decision of the First Division. The proceedings originated in an action of reduction brought by the Caledonian Railway Company against Sir Norman Lockhart and others, for the purpose of reducing two decrees arbitral, pronounced on the 22d of January 1848, and the 20th June of 1850, respectively, by David Low, Professor of Agriculture in the University of Edinburgh, under a submission entered into between the father of the respondent and the appellants. It appears that the appellants, in forming their line, required a portion of the late Sir Norman Lockhart's land, and a submission was entered



into by which Professor Low was appointed arbitrator. He having made his award, the Company had endeavoured to set it aside upon various grounds that will appear fully in the judgment. The Court of Session assoilized the defender.

The LORD CHANCELLOR, in delivering judgment, said the first ground upon which the appellants sought the reduction of the two awards was, that the authority of the arbitrator had expired before he pronounced them. There had been much controversy as to whether the arbitrator was appointed under the 8th and 9th of Victoria, cap. 19, wherein it was provided that, if the arbitrator did not make his award within three months, the claim of the landowner should be settled by a jury, or whether he was appointed under the common law. In the first case, it was contended by the appellants the awards were bad, inasmuch as they had not been made within the three months, as specified by the Act; and in the second alternative, that they were void by reason of the death of Sir Norman Lockhart, the respondent's father. He was clearly of opinion that the authority of the arbitrator continued to the time of his making these awards. The word of the Act merely gave a power to either party to obtain a settlement by the decision of a jury in case of improper delay on the part of the arbitrator. It could not surely have been the intention of the legislature to prevent the parties mutually agreeing to an extension of the time, as had been done in the present case. The enlargement of the time, at all events, amounts to a fresh submission. The appellants then contended that the authority of the arbitrator expired on the death of Sir Norman Lockhart. He was of opinion with respect to this point, that the arbitration did not determine on the death of the landowner. The arbitrator was in the situation of a person appointed to fix the value of goods supplied, in which case, by the law of Scotland, the authority of the arbitrator would continue, notwithstanding the death of one of the parties. It had been also argued that the awards were void by reason of the misconduct of the arbitrator. That point had been most properly abandoned, and he did not wonder at it, for there did not appear to be the slightest evidence to support it. The proceedings were perfectly regular and in accordance with the Scotch law. The chief stress was laid upon the point that the arbitrator had exceeded his authority, and that the erroneous parts of the awards were inseparable from the rest, and therefore altogether void. The chief objection made to the awards on that point was, that the arbitrator had awarded compensation for prospective damage to the lands, in respect of the waters of a stream being dammed up by the Company's works. It was contended that the proper remedy was by action when such damage occurred. But he thought the arbitrator was authorized to deal with prospective damage. No future action could be brought against the company, except for negligence in the building of their works. The objection had then been made, that the arbitrator had improperly given compensation in respect of lands other than those taken by the Railway Company. He considered that the question to be considered was, not "where were the lands," but "were the lands injured." The only forcible argument urged by the appellants was, that the arbitrator had included in the payment to be made to Sir Norman Lockhart, the claims of his tenants to compensation, against which, he was to give them an indemnity. But it had been made out to his satisfaction, that no sum was awarded under this head, to which Sir Norman Lockhart had not a claim, and that the Company cannot in the slightest degree be damaged by the award. He should, under these circumstances, advise their Lordships that the appeal should be dismissed with costs.

The other noble and learned Lords having concurred,

The appeal was dismissed with costs accordingly.

PERCY ARTHUR CUNINGHAM, *Appellant*; v. SIR CHARLES CUNINGHAME FAIRLIE, *Respondent*.

In 1787, Alexander Fairlie, Esq. of Fairlie, in the county of Ayr, executed a disposition and deed of entail of those lands, which was recorded in the register of tailzies in 1804. The said deed contains various prohibitory clauses, directed

against altering the order of succession, selling, disposing, wad-setting, or empignoring the lands, and contracting debt thereupon. The irritant clause corresponding thereto was in the following terms:— Declaring hereby, that if the heirs male of anybody, or any of the other heirs or members of entail above-mentioned, substituted to them, shall act and do in the contrary of any of the particulars above specified *with respect to altering the order of succession, selling, or contracting debt*, then, and in that case, all and every one of such debts, acts, and deeds, with all that shall happen to follow, or might otherwise be competent to follow thereupon, shall be, *ipso facto*, void and null, and of no force, strength or effect, in the same manner as if the said debts, acts, and deeds had not been contracted, done, acted, or committed." It will be seen that, while the prohibitory clause struck at several things besides altering the order of succession, selling, or contracting debt, the irritant clause specifies these three things only. The corresponding resolute clause followed the language of the irritant clause.

Sir Charles Cuninghame Fairlie, the present heir of entail in possession under the above deed, raised an action of declarator in 1856, in which he sought to have it declared that the above entail was not a valid and effectual tailzie of the lands, and that, notwithstanding the fetters contained therein, the pursuer had full and undoubted right to sell, alienate, and dispose the same, in whole or in part, in any way he might think proper. The ground on which he made this claim was, that the irritant and resolute clauses were defective in not fencing the prohibitions against disposing the lands. And it was enacted by Lord Rutherford's Act, 11 and 12 Vict., c. 36, that where any entail was defective in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail, or of the investiture following thereon, such tailzie should be taken and deemed to be invalid and ineffectual as regards all the prohibitions.

The Lord Ordinary, and afterwards the Second Division of the Court of Session, held that the deed of entail was invalid, whereupon the present appeal was brought.

LORD CRANSWORTH said, that the irritant clause was defective in not including the disposing of the estate. It was a well-established rule that, where one of the things prohibited was left out in the irritant clause, then such thing was not effectually irritated, and this was a defect in the entail. It was said that Lord Rutherford's Act meant only where there was a defect in the prohibitions; but it clearly meant when one of the prohibitions was not effectually guarded by the irritant clause. That was established by many recent cases; and even if there was no authority on the subject, that was the conclusion at which he would arrive. The present appeal must therefore be dismissed with costs.

LORDS WENSLEYDALE, CHELMSFORD, KINGSDOWN, having concurred,  
The appeal was dismissed with costs.

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## English Cases.

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CONTRACT.—*Bill of Exchange*.—B. was the holder of certain bills of exchange accepted by C. While they were running, B. wrote to D., "In consideration of your guaranteeing me that the said bills will be paid and retired by C. when due, I engage and bind myself to guarantee unto you L.200 towards the repayment of Scotch whiskies ordered by E. from you," etc.; and D. answered, "We guarantee that C. will retire the two acceptances referred to therein when at maturity, in consideration of your having guaranteed E. to the extent of

L.300," etc. These were held to be independent promises, and that D. was at liberty to sue B. on the contract without proving the performance of his (D.'s) part of the contract as a condition precedent.—(*Christie v. Borely*, 35 L. T. Rep. 328.)

**ARBITRATION.—*Lands Clauses Act.***—Among other things submitted to an arbitrator, was the amount of damage by a certain severance which was in dispute. In his award he was silent on this point. On a motion to set aside the award on this ground, it was held that the silence on this claim was to be construed as intending that the umpire gave nothing for it, and that the words "having weighed and considered the evidence and matters so referred to me," were equivalent to the *de præmissis*, and that the award was good.—(*Re the Arbitration of the Duke of Beaufort and the Swansea Harbour Trustees*, 35 L. T. Rep. 370.)

**ARBITRATION.—*Umpire.***—Where two arbitrators appoint different persons as umpires, one of whom is not known to one of the arbitrators, but is stated by the other to be a fit person, and they agree to draw lots to determine who shall be umpire, and the lot falls on the person who was not known to one of them, it is an invalid appointment.—(*Re the Arbitration of Wolf, etc.*, 35 L. T. Rep. 373).

**CONTRACT FOR PURCHASE OF SHARES.—*Misrepresentation.***—B. purchased 200 shares in a limited company, induced thereto by information given to him at the office by the managers and the reports of the directors, which represented that the company was entitled to certain lands in Canada, which was proved not to be true, and that the directors had adopted a system of payment of all claims every six months, which was not so. It was, however, shown that, before completing his purchase, B. was informed that the manager had greatly exceeded his powers, and had incurred heavy liabilities, but that, nevertheless, he chose to complete his purchase. It appeared also that no specific inquiry had been made by him as to the title, and no specific representations had been made by the directors as to the land, and on these grounds the Court dismissed a bill praying that the contract might be rescinded. But it came out that the company had not observed the directions of the Limited Liability Act as to making out a balance-sheet in a specified form, and therefore the Court would not give them costs. *Stuart, V.-C.*: Where the subject-matter of the purchase is a certain number of shares in a public joint-stock company, the affairs of which are conducted under the regulations of an Act of Parliament, requiring a periodical and accessible record of its transactions and its assets, there may be some modification of the rule applicable to the purchase of ordinary property. Parliament has imposed terms on these joint-stock companies, compelling them to supply an accessible record with a view to the safety of creditors and purchasers. These sources of information would be provided in vain by the Legislature, unless a resort to them was considered a part of the duty of a purchaser. If it be held that the doctrine of constructive notice is not applicable to the case of negotiation for a private contract of partnership, as in the case of *Rawlin v. Wickham*, where there are no legislative regulations for the supply of information, it is a very different thing to apply that principle to the case of a public joint-stock company. Nevertheless, fraudulent misrepresentation or fraudulent concealment as to the state of its affairs, especially if made so as to disarm inquiry, must have their due effect in voiding purchases of shares in public companies, subject to these legislative safeguards, if the fraudulent conduct be clearly proved. . . . The plaintiff's own statement of what took place after the purchase, shows plainly enough that there was not present to his mind anything as to the particular nature and extent of the right to the land which operated as a material inducement to the purchaser. Even when he ascertained that the counsel of the company had given an opinion that the land could not be dealt with by sale or mortgage before the completion of the railway, his conduct shows that he did not think that on that point he had to complain of misrep-

sentation, or could ask to have his purchase set aside on that ground. He disputed the construction put upon the Act, and insisted, after a careful perusal of the Acts, that the counsel was mistaken. The sort of misrepresentation which will avoid in a contract, must be misrepresentation of a fact. Where the alleged misrepresentation is not as to fact, but on a doubtful question of law, it can scarcely be a sufficient ground for rescinding a contract.—(*Conybeare v. The New Brunswick, etc., Company*, 8 W. R. 281.)

**ASSURANCE.—Proof of Death.**—A policy assured a sum to be paid in the event of the assured being injured by an accident, and dying from the effects of it within three months. It provided also that no claim should be made in respect of any injury, unless caused by some outward and visible means of which satisfactory proof could be furnished. It was proved that the assured went out one evening to bathe; his clothes were found on the steps of a bathing-machine, and six weeks after a body was washed ashore, but not identified as being that of the assured. It was held that, even if it had been identified as his, the fact of his so dying was no evidence that his death proceeded from an injury caused by accident or violence within the meaning of the policy. The Lord Chief Baron observed that the case was suspicious; and the assured might be waiting in some part of the world to hear the result of the trial, and participate in the profits of the policies.—(*Trew v. The Railway Passengers' Assurance Company*, 35 L. T. Rep. 377.)

**PATENT ACT.—Inspection.**—It was intimated, but not actually decided, in *The Patent Type Founding Company v. Waller*, 35 L. T. Rep. 382, that sect. 42 of the Patent Act, which empowers the court to order an inspection, etc., of the matter in dispute, does not extend to permission to take away specimens for the purpose of making an analysis.

**DAMAGES.—Contract to give Evidence.**—B. being about to institute a suit for divorce on the ground of insanity before marriage, retained C., a surgeon, to collect information and attend and give evidence at the hearing on his behalf. The evidence collected sustained the allegation, but C. failed to appear at the hearing, although he had received money for his services, and B. was therefore compelled to withdraw the record. In an action against C. for the negligence, it was held to be sufficient evidence of an implied contract to attend as a witness, and that B. was entitled to substantial damages. But that to support such an action it must be established that the contract by the defendant was not only to attend at the trial, but to do so without subpoena or conduct money.—(*Yeatman v. Dempsey*, 35 L. T. Rep. 402.)

**RAILWAY.—Special Contract.**—B. sent goods to a station by a carman, and afterwards, having learned the rates of carriage, he wrote to the company: "Please forward the three cases of marbles, not insured, as directed, to C., to be called for, etc.—Signed C. M., per W. W." W. was the servant, acting for M., the owner. Sect. 7 of the Railway, etc., Traffic Act, 17 and 18 Vict., c. 31, enacts that "no special contract between the company and any other person respecting the receiving, etc., of goods, shall be binding upon or affect any such party unless the same be signed by him or the person delivering such goods for carriage." The above was held to be under this section a sufficient contract, complete in itself, meaning that the goods were to be forwarded at the owner's risk, and that the signature was a sufficient signature by the owner within the above section.—(*Peek v. The North Staffordshire Railway Company*, 35 L. T. Rep. 407.)

**BILL OF EXCHANGE.—Consideration.**—B. carried on business at Liverpool, under the firm of B. and Co., and in partnership with C. had a house at Rio, under the firm of B., C., and Co. D.'s correspondents at Rio drew a bill on D., which they sold to B., C., and Co., the money to be paid in a month. B., C., and Co. passed the bill to B. and Co., in the usual course of business. The purchase-money not being paid, it was held that B. could not recover on the

bill, being in the same position as if the Rio firm were the nominal plaintiffs, and as between him and defendants there was a total failure of consideration. Martin, B. : On the first point it is clear, if a defendant makes a defence against one plaintiff in an action of this description, he makes a defence against all, however numerous they may be. On the other point I have had some doubt. I was much struck with the argument, that this transaction ought to be looked at by itself, and regarded as a case in which the purchase-money was to be paid in a month of a bill at three months ; and that the principle of a condition precedent to the payment of money ought to be applied to it. It appears to me that principle is applicable in this case, regarding it as a transaction between three persons, all of whom knew the circumstances, and have similar rights."—(*Astley v. Johnson*, 8 W. R. 218.)

**THEFT OR RESET.—Marital Coercion.**—In this case it appeared that there was evidence of part of the stolen property being found in the house where the prisoner and her husband lived together, and of other circumstances which warranted the jury in finding the husband guilty of receiving. The evidence peculiarly applicable to the prisoner consisted in the fact of the prisoner, some time after the things were stolen, having produced (in the absence of her husband) some of the stolen property, and saying to a witness that they were to be destroyed, and desiring the witness to state some falsehood with respect to them ; she had also, at the time of her apprehension, on her fingers some of the stolen property. On the behalf of the prisoner the judge was requested to put it to the jury to find whether the prisoner received the property from her husband or in his absence ? This the learned judge declined to do, but upon the jury returning a verdict of guilty, and the same request being again made, he decided upon reserving the point for the consideration of the Court above. That Court decided that the question ought to have been so left to the jury. Erle, C.J., said—It was perfectly consistent with the facts proved that the goods might have been taken to, and received by, the husband at his own house, and so come into the possession of the wife through her husband in a manner that did not render her liable to be convicted. The goods clearly were taken to the husband's house. If the question had been left to the jury, and they had convicted the wife, the court would have supported that conviction ; but as it has not been so left, the Court thought it more satisfactory that her conviction should be quashed."—(*Reg. v. Wardroper*, 35 L. T. Rep. 416.)

**RAILWAYS.—Contract to Carry.**—B. delivered oxen at the C. station of the D. Railway Company, to be conveyed to X. The line from C. to D. was the property of the D. Company, but from D. to E. it was the property of the F. Company. The D. Company charged one rate for the entire journey, which was to be paid at X., and issued a contract note, which was signed by B.'s agent, and of which a condition was, that, "for the convenience of the owners, the company will receive the charges payable to other companies for conveyance of such cattle over their lines, but will not be subject to liability for any loss, delay, default, or damage arising on such other railway." The cattle were loaded on a truck of the F. Company, and sustained injury from a defect in it, while on the F. Company's line. B. brought an action against the F. Company, alleging a delivery to them at the C. station. It was held, however, that the action would not lie, there being no contract between them and the defendants ; that there was only one contract for the entire journey, and that was with the D. Company.—(*Cozon v. The Great Western Railway Company*, 35 L. T. Rep. 442.)

THE

# JOURNAL OF JURISPRUDENCE.

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## THE PHILOSOPHY OF LAW MAXIMS.

### II. DOLUS—CULPA—MORA—IMPERITIA.

IN resuming our commentary on those maxims of law which have a common application in the Civil law and in the law of Scotland, we come now to consider, as we proposed in our last number, those which illustrate the doctrines of *dolus*, *culpa*, etc. It is only as affecting the liability of parties to contracts that these doctrines possess any practical importance, and our attention will, therefore, be confined to their legal operation within these limits. To the first branch of the subject, we shall only advert in a very general way. It will be in the recollection of some of our readers, that this part of the subject has lately undergone discussion in the very interesting and instructive series of papers on the Law of Fraud, communicated to this Journal. As regards the other points alluded to, our object will be to state a few comprehensive rules, embracing as wide a range as possible of the circumstances in which they are generally applied. To enter on the discussion of controverted points, or to attempt a minute analysis of individual cases, would be foreign to our purpose. In the broad general principles—partly of natural equity—partly of conventional authority—which underlie the whole doctrine, there is a remarkable resemblance, we might almost say, identity, between the Civil law and the law of Scotland, and it is of these general principles only that we now propose to treat.

I. *Dolus*.—In all essential particulars, the ordinary definitions of *Dolus*, are clear and consistent with one another. Under it we must include everything that comes within the verge of fraud. It is "*omnis calliditas, fallacia, machinatio ad circumveniendum, fallen-*

*dum decipiendum alterum adhibita.*" Its distinguishing characteristic is, that it admits of intention or design ; and, in this sense, as establishing an opposition between damage, which is occasioned by a mere error in judgment, and loss arising from a criminal act, it is always, both in our law, and in the Roman system, specially distinguished from *Culpa*. We must again refer the reader to a prior series of papers, for a detailed exposition of the principles which constitute the doctrine of *Dolus*. At present we confine ourselves to the remark—and, in expressing it, we may be held to enunciate a general rule—that, irrespective altogether of convention, the effects of intentional wrong must be condoned by the party who commits it. The apparent qualifications which might be adduced from the practice of the law of Scotland, may be explained, for the most part, by the peculiarities of individual cases, without disturbing a principle scarcely more axiomatic in the region of morals than universal in its operation within the more positive sphere of law.

II. *Culpa*.—*Culpa* is defined by Paulus as "*quod cum a diligente provideri poterit non est provisum.*" It is *omne factum inconsultum*, every inconsiderate act, whether of omission or commission, whereby loss is incurred by another—as a mere error of the understanding it has already been distinguished from *Dolus*, which is an error of the heart ; within its own limits, it admits of degrees, and of these jurists have generally admitted three. *Culpa* is said to be either *lata*, or *levis*, or *levissima*. *Culpa lata* has been variously defined as "*negligentia crassa ;*" "*nimia negligentia, id est, non intelligere quod omnes intelligunt ;*" "*dissoluta negligentia quæ prope dolus est.*" Sometimes the definition takes a negative form,—the amount of negligence in any particular case being determined by a consideration of the care or diligence which might be looked for under similar circumstances. Diligence, also, being arranged by jurists under three heads, "*culpa lata*" is said to be the want of the "*diligentia communis omnium hominum ;*" the greatest amount of blame—the lowest standard of care. Negligence of this sort, in one's own concerns, amounts to prodigality ; in the concerns of others, it verges upon fraud. The second degree of diligence is that which people are in the habit of employing in the management of their own property, and which they are expected to extend to that of others when it is committed to their charge. Opposed to this is *culpa levis*. *Culpa levissima* is the falling short of a standard higher still,

—of an amount of diligence which is even more exact and vigilant than that with which a reasonable man is wont to administer his own affairs. Of this nature was the diligence required of a borrower, who gave no interest for the use of money, and it was technically known among the Roman jurists as the care of a “bonus” or “diligens pater-familias.” Such are the three common divisions of the subject. Some modern lawyers have aimed at a still more minute classification, rejecting the absolute standards of the older law for a relative one borrowed from each particular case. *Culpa* is then spoken of as being either *culpa in abstracto*, or *culpa in concreto*. In a special sense, *culpa levis*, the second degree of negligence which has been incorporated among the so-called absolute standards—the falling short of that diligence which a man shows in the management of his own affairs—may be considered as *culpa in concreto*; but the character of concrete or abstract may be generally applied to the three different kinds, and the jurists with whom the distinction is in vogue, have, for the most part, given it this application.

Our attention has hitherto been confined to the definitions of the subject employed by the Civilians and in our own institutional works. A clearer view of the nature of the distinctions in question may be obtained, by considering their relations to the different classes of contracts, with respect to property. Questions of liability of this nature are most apt to arise in reference to the possession of property; considering, therefore, the different purposes for which it may pass out of the hands of the original owner, we obtain the following result. The case is by no means limited, as, at first sight, would appear to the party who is possessor merely, and not proprietor. There are circumstances in which the latter may be called upon to make good the effects of *culpa*, even with reference to his own property, and when placed under the charge of another. The property of one may be in the hands of another.

(1.) For the purpose of custody alone, as in the contract of deposit. Our limits will not permit us to dwell upon the distribution of interest and burden as they occur in the several obligations; we shall merely state the case shortly, as between the possessor and proprietor. Here the possessor is responsible for *culpa lata* only; there can be no question as to the liability of the owner, so far at least as the subject of the contract is concerned; for, if the property perishes through his fault, it perishes to himself.



The same is the case where, in a contract of sale, the bargain being finally concluded, the seller undertakes the care of the goods at the buyer's request. *Res perit domino* in the event of loss; and, in a question of liability, all consideration of the original contract is departed from, and the possessor is judged according to the ordinary standard of diligence which obtains in gratuitous trust.

(2.) For the purpose of use by the possessor, without compensation, as in the contract of commodate and *precarium*. In these cases, the possessor is liable for *culpa levissima*. The owner must sustain the burden of accidental loss; and, if the property perish through any fault of his, he has not only to bear his own loss, but he is bound to reimburse the possessor of all proper outlay, should such a claim arise.

(3.) For the purpose of use by the possessor, with compensation to the proprietor, as in the contract of hiring. Here the liability of both parties is equal, each being bound to answer to the other for the effects of *culpa levis*. Accidental perishing of the subject falls, as in the last instance, upon the owner, and, *à fortiori*, loss occasioned by his own fault will not relieve him from the obligation to make good the damage sustained by the possessor.

(4.) For the security of the possessor and the continuance of the credit of the proprietor, as in the contract of pledge. The standard is, again, *culpa levis*, ordinary diligence being necessary on both sides, and the question of loss standing as before.

(5.) For the purpose of management by the possessor, without remuneration, as in the contract of *negotiorum gestio*. As a general rule, the liability of the possessor is only for *culpa lata*; in particular cases it may be extended to *culpa levis*, and even to *culpa levissima*, according to the motives which dictated, and the necessity which justified, his interference. In this case, as in deposit, the bearing of *culpa* by the owner, upon the subject of the contract, does not admit of practical estimation.

(6.) For the purpose of management by the possessor, with remuneration from the proprietor, as in the contract of mandate. The middle degree of diligence is again the standard for both parties, as well in questions of loss upon the subject of the contract, as with reference to their reciprocal obligations. But it is not easy to reduce the principles which enter into this contract under any general rule. In its practical operation, it is, perhaps, more dependent than any other in the system of obliga-

tions to the contingencies and peculiarities of conventional arrangement.

Under another head might be included the purpose of society, or partnership. The broad distinction, however, between owner and possessor, is here lost sight of in the presence of a common interest and a common stock, and the contract is therefore best regarded from a general point of view.

III. *Mora*.—Another ground of the conversion or modification of the original object of obligations is *Mora*. In a general sense it may be held as comprehended under *Culpa*; but it is commonly treated as an independent doctrine both in the Roman system and in the law of Scotland, and it plays a specially important part in the relation between debtor and creditor. It is a more difficult task, however, to determine its general principles, than to fix the rules which enter into questions of *Culpa*. While the latter has gradually acquired a stereotyped significance, and its practical estimation has become limited, for the most part, to the several obligations, the former, as less impressed with a technical character, may be the subject of calculation between parties in almost every transaction of life. Beyond a few propositions, therefore, of a vague and somewhat desultory character, it would not seem safe to venture upon very particular statements. As to the following, there can be no manner of doubt.

(1.) In all transactions which are affected by a condition of time, either by implication or in virtue of express agreement, loss accruing from any failure to observe the limits specified, must be borne by the party in fault. At first sight, this proposition has the character of a mere common place. It is a truism, however, which is sometimes attended by the most important results; for, while in some obligations the presence of *Mora* has only the effect of burdening one of the parties with an incidental, and, perhaps, not serious loss, the effect of it in others is to affect their constitution with a radical change. It is in virtue of this principle, for example, that in a contract of sale, where the bargain has been finally concluded, any undue delay in the delivery will transfer the risk from the buyer to the seller, contrary to the rule "*Periculum rei venditæ, nondum traditæ, est emptoris*." It is a limitation, however, to the general rule, that if the guilty party is able to prove that the loss would equally have arisen under other circumstances, and, notwith-

standing his delay, the mere fact of blame, on his part, is not sufficient to establish liability.

(2.) *Res perit domino* is a rule of almost universal application, when loss to property arises from a *casus fortuitus*, extending even to cases where the subject perishes in the hands of the mere possessor, who is, gratuitously, deriving all the advantage that may be drawn from it. Subject to the limitation expressed in the last proposition, it is a consequence of the presence of *Mora*, that the party guilty of it is denied the privilege of pleading this equitable exception.

Taking the relation between debtor and creditor as our point of view, we obtain the following result :—

(1.) *Mora debitoris* (*mora solvendi*), which properly presupposes admonition from the creditor (*interpellatio*), has the effect to perpetuate the obligation, so that, thereafter, the debtor is not released by any accident which may render the natural fulfilment of the obligation impossible, but is bound to suffer the direct loss from *Mora*, and to repair his adversary's damage. The doctrine is thus stated in the Pandects, "*Debitor tenetur etiam de casu fortuito quando ejus mora præcessit interitum rei quia mora perpetuat obligationem.*"

(2.) Conversely, *mora creditoris* (*mora accipiendi*), that is, unjustifiable refusal to accept the fulfilment of the obligation, when duly tendered, reduces the liability of the debtor to a *præstatio doli, and culpæ latæ*.

(3.) A still stricter view of the relation between debtor and creditor, as constituted by money obligations, establishes the rule, that a delay in payment of the principal, will ground a claim for interest. In ordinary circumstances, such claim must be preceded by a demand from the creditor ; but, in obligations, which are conditioned by a definite day, the rule operates "*Dies interpellat pro homine.*"

IV. *Imperitia*.—The principles of this doctrine, though comprehended under a title bearing all the character of a generic name, are essentially of a special nature, and will be best considered at a future stage of our discussions in connection with the maxim "*Imperitia culpæ adnumeratur.*"

Passing from these general statements and overrules which assume the form of mere definitions, such, for example, as *dolus et*

*lata culpa æquiparantur*," and the like, the substance of which has already been affirmed in the preceding observations, we meet with the rule—

"*Generaliter cum de fraude disputatur non quid habeat actor sed quid per adversarium habere non potuerit considerandum est.*"

As a general rule in questions of fraud, the pursuer's claim is to be judged, not by the amount of his debt, but according to the benefit which, but for his adversary, he might have enjoyed.

It is not easy to conceive under what circumstances, the qualification, which introduces this rule, might be held to operate; for, if one feature more than another is characteristic of the Roman jurisprudence, it is the singular rigour with which the reparation of fraud is exacted from the party who commits it. A similar tendency is traceable in the law of Scotland; and the rule before us at once illustrates the common attribute, and, in directing our attention to the almost identical application of an important doctrine in the two systems, furnishes us with another proof of the striking approximation which they have both made towards the same great principles of mercantile law. The object of the Roman jurist in the rule is to enunciate a general standard to which reference might be made in fixing the compensation to be awarded in redress of obligations fraudulently undischarged; and the pith and the substance of it lie in the facts—first, that the party who suffers enjoys the benefit of the very highest scale—the measure of possible profits; and, secondly, that these profits are awarded irrespective altogether of the consideration whether the wrong-doer himself has previously enjoyed them. It is not the *damnum* merely, the "*quid habeat actor*," but the *lucrum* also, the "*quid habere non potuerit*," that enters into the calculation, and it is the indefiniteness of this *lucrum*, and the wide range which it may probably assume, that really constitute the burden of the defender's punishment. In spite of its severity, however, the books of the Civilians furnish us with numerous illustrations of the rule. It was in accordance with this principle, for example, that if a person had fraudulently failed in obtaining his principal's ratification to an engagement which he had promised in his name, he was liable to the contracting party, not only in the damage which he had actually sustained, but for the profits which the natural issue of the obligation might have enabled him to make. So also an heir; who had illegally detained from the legatee a legacy bequeathed to him by the testator, was bound not

only to restore such profits as he himself had drawn, but those also which the legatee might have derived. In turning to the law of Scotland, on the other hand, for an illustration of the rule, we are at once reminded of the distinction, of which the principle which underlies it is its essential basis, between the compensation of a simple breach of contract and the damage which arises when the breach is aggravated by fraud. The general rule, in the former case, is, that a person bound absolutely failing to fulfil his engagement, must make good the direct loss which his adversary has sustained; and the principle observed in calculating this loss is, that while on the one hand, nothing in the shape of profits is allowed to the defender, it is jealously seen, on the other, that his condition is not worse; in the latter, a more stringent rule of liability is adopted, and the guilty person is subjected to the burden of repairing, not direct loss only, but that also which is collateral and consequential. It is this distinction to which we previously adverted, as illustrating the concurrence of the two systems in giving practical effect to the principle of the rule. It enters largely into the law of Scotland; and the Pandects are replete with passages which show that it was equally familiar to the Romans. Paulus, in estimating the liability of a seller who does not give possession to the buyer at the proper time, expressly indicates that the element of fraud, as an important qualification of the general rule, was clearly present to his mind.

So much for the punishment of fraud. But it sometimes does not clearly appear what fraud is, and the rule says,—

*“Nullus videtur dolo facere qui suo jure utitur.”*

No one is held to act fraudulently who avails himself of his own right.

This rule is to be interpreted in a purely negative sense, as implying what, in particular circumstances, a person may do without subjecting himself to the pains and penalties of fraud. This principle of construction, at least, appears to be at once the most natural and the safest, and it is difficult to see grounds on which the preference should be yielded to another. It certainly cannot be held to indicate any antithesis between fraud and legal rights, condemning the one and sanctioning the other, in the simple view of their broad naked contrast. In the region of morals, this is not the relative position of right and wrong, and we know that, practically, there is no such opposition in the sphere of law. What is fraudu-

lent is clearly enough marked, and the prohibition is absolute that it shall not be done. The converse proposition, however, is not always true, that a person may push his rights to the utmost limits to which, according to an abstract view of things, he may seem entitled to do ; and the numerous restraints imposed on the exercise of property in deference to public policy, neighbourhood, and the like, are sufficient evidence of the extent to which the qualification is familiar to the practice of our law. In view of this consideration, therefore, it would seem as if the juxtaposition in the rule of these two conditions was less intended for the purpose of establishing their opposition, as of showing how clearly the limits of the one border on the confines of the other. In this sense the rule is strictly true, both of the civil law and of the law of Scotland, and may be illustrated by reference to a principle which is clearly recognised in both. It is not more grateful to the genius of our law, that all fraudulent preferences on the eve of bankruptcy should be repressed, than it was the aim of the Roman to secure an equal distribution of property to all who had an interest in the common debtor's effects. But this object can only be attained, in a general way, by the enactment of certain statutory rules ; and these rules, necessarily drawing after them a strict interpretation, there must be always scope for a large class of doubtful transactions not falling under the jurisdiction, but still inconsistent with the spirit of the law. Such an evasion would be practised by a creditor, who, in the knowledge of the insolvent circumstances of his debtor, obtained payment of his own debt to the prejudice of the claims of others ; but, *utitur suo jure*, and so long as he keeps within the limits of the law, he is not subjected, either by the civil law or by the law of Scotland, to the pains and penalties of fraud.

But the law, while guarding legal claims, and thus involuntarily lending its sanction to what may not always be morally right, is, at least, strict to mark that no advantage shall be derived from what is, clearly, legally wrong. The rule is absolute.

*" Nemo ex suo delicto meliorem conditionem suam facere potest."*

No one can better his condition by his own wrongful act.

Departing from the general question of fraud, and the penalty which attaches to it, we come, in this rule, to consider one of its more special aspects in which, under guise of a trite moral saying, it indicates the existence of a most important and widespread prin-

ciple of law. In its obvious and *prima facie* meaning, it has little or no significance beyond averring in general terms the unlawfulness of crime; it is only in what may be called its secondary sense that it has an interest for our present subject. As thus interpreted, its meaning is, that no one shall be allowed to derive any benefit from the effects of his own criminal act; in other words, that a plea which, in point of law, might be considered generally good, shall, in point of fact, be denied to the party who maintains it, if it draws support, in any way, from the consequences of his own wrong.

The rule is so familiar to the practice of our law, that we need not pause to state any special illustrations of it. Upon it depends the general principle, according to which action is denied to a smuggler upon all bargains entered into with reference to vitiated goods. The transaction may be, in itself, lawful, and apart from the original *vitium reale* may support the case which the smuggler maintains; yet the law will not give it effect, because, in doing so, it would sanction the triumph of a criminal act, and the prohibition is absolute that there shall be no fraud. In the Roman law, the illustration which most readily occurs, vindicates the rule in a very striking manner. In virtue of the privilege known as the *beneficium competentie*, a debtor might claim to be condemned only in an amount which he could pay without being reduced to a state of destitution. This plea, however, he could maintain, only when he had made a full disclosure of his circumstances. If, in executing a "cessio bonorum" to his creditors, he had attempted to secure his own advantage by fraudulent reservations, he was utterly excluded from the benefits of the customary relief. Numerous other corroborations of the rule might be adduced from the principles of both systems, were it not unnecessary to dwell at greater length upon a point which is the subject of almost daily and universal practice.

W. A. B.

## REPORTING v. BOOK-MAKING.

*Select Cases in Chancery, temp. Napier.* Edited by WILLIAM B. DRURY, Esq., Barrister-at-Law. Dublin : Hodges, Smith, and Co. 1860.

*The Law Reporter, or Law Times Reports.* New Series. London : Crockford.

*Macqueen's Reports.* Vol. III. Part 3. London : W. Maxwell.

THOSE members of the legal profession in Scotland who are sensible of the advantage to be derived from possessing themselves of the current English decisions, must experience some little difficulty in making a selection from amongst the various series of Reports which now issue from the London press. The embarrassment we refer to is not exactly one of that simple metaphysical character which is represented by the figure of the ass betwixt the two bundles of hay. If the problem were simply to make sure of reading the best reports, Baron Bramwell is ready with a solution,—Read them all. That indefatigable, though somewhat cross-grained votary of the law, has, it seems, no favourite authors in this department of literature ; but regarding the whole file of volumes as so many enemies to be conquered, he resolutely attacks them one after another, and never flags while a case remains to be mastered. “ I read,” said his Lordship, in his evidence before the Common Law Commissioners, in 1857, “ I read what I suppose you may call the orthodox Reports of the three Common Law Courts, namely, Ellis and Blackburn, the Common Bench Reports, and Hurlstone and Norman. I read the Law Journal Reports, Equity and Common Law, and I read the Jurist Reports. I read over the same case very often three times ; but if I do not do so, I am not sure that I shall not miss it, so I read it to make sure !”

Such a systematic study of the decisions of the English tribunals, is doubtless highly praiseworthy, and indeed indispensable, in the case of one who is to contribute, by his judgments, the materials for future volumes of these interesting periodicals. But, unhappily, life is too short for ordinary mortals to attempt the perusal of all the excellent works which have been written for the instruction and entertainment even of their own profession ; and for the Scotch lawyer at any rate, a more cursory study of the English



treatises ought to be sufficient. It is well known, that the exigencies of professional duty, and the increasing value and importance of English decisions in commercial and civil law, have led to the introduction of the English law reports into private libraries in Scotland, where they are fast supplanting the unwieldy and never-to-be-opened Dutch commentators, the pride of ancestral collections. But with the greatest respect for the industry of the leading lawyers of our generation, we can scarcely go the length of entertaining the supposition that they *read* those stores of neatly bound volumes, which, for purposes of reference, they find it convenient to accumulate on their shelves. Of course, the more authentic series of reports are to be preferred for permanent use; but those who desire, out of the time which a practising lawyer can devote to miscellaneous reading, to attempt to keep abreast with the current law in the sister kingdom, will look in vain to the "orthodox reports" for the means of satisfying their intellectual thirst. To such readers the grapes are sour. They are practically out of reach, from the mere impossibility of obtaining leisure sufficient, within any assignable period, for digesting them. To fit such reading for assimilation, some preparatory process of condensation is absolutely required.

In compressing the raw material of legal decisions to readable proportions, there are two distinct methods of reduction, both perfectly legitimate in their way, and capable of being used either separately or in combination, according to the extent of reduction contemplated. The works whose titles are first prefixed to this essay, are excellent illustrations of the two methods on which they severally proceed. Mr Drury's is a selection of the more important cases decided during the time to which it relates. The *Law Times' Reports* include *all the cases* in the various English Courts, the reports being made shorter than those styled orthodox, simply by a careful condensation of the narrative, and by abridging the opinions of the Judges in cases of minor importance. Our own *Digest of English Cases* being compiled, as our readers are aware, from the published reports, and chiefly from those of the *Law Times* and *Weekly Reporter*, we are able to speak with some confidence as to the merits of those excellent serials. We have been especially impressed with the care which is evidently taken in the *Law Times' Reports* to set forth fully the leading points in the arguments of counsel, and the authorities to which they bear reference; and

although the judgments are given in an abridged form, the statements of legal doctrine, always the most valuable part of the speeches, are clearly exhibited, while a judicious discretion is observed in curtailing the recapitulation of facts which have already been explained in the introductory part of the report. We would strongly recommend to the profession in Scotland to avail themselves of the opportunity now afforded by the commencement of a new octavo series of these reports, to possess themselves of a work, which is at once convenient for reference, of readable dimensions, and not more expensive than the Scotch Decisions. Our own Digest, we may add, embodies the two principles of selection and compression. We can assure our readers, that its compilation is a work of very considerable labour, and involving a large extent of reading. The cases are regularly noted, as they appear in the English reports; and we believe that no case, bearing however remotely on the laws or usages of Scotland, is omitted. We do not profess, as a general rule, to report the arguments; but the facts, it will be found, are set forth pretty fully; and besides giving the import of the decision, any statement of doctrine it may contain is quoted *verbatim*.

Mr Drury's selection of Irish cases deserves more than the passing notice, which is all we can give to it at present. It is an attempt to supply what has long been felt as a *desideratum*,—a report of such decisions of the local Courts as possess more than a local interest. The editor's part of the work is creditably performed, and he has, besides, enriched the reports with some valuable supplementary notes, after the manner of Smith's Leading Cases. We are convinced that the English profession might study with advantage, many of the decisions both of the Scotch and Irish Courts on questions of general law. But unfortunately the local reports are not in the hands of the English profession, and they are, besides, too voluminous, and too much occupied with purely provincial law, to be interesting to that class of readers. We have always thought that a judicious selection from Scotch and Irish reports would be well received by the English lawyers. Meanwhile, Mr Drury has made a beginning, his work having been prompted by a desire to make public the decisions of the very eminent judge, Lord Chancellor Napier, who held office under Lord Derby's Administration in 1858–59. These reports include many cases of the highest interest in general law. The opinions, which are replete with learning, were in most instances committed to writing, and are reprinted

from the judges' MS. Many of them, regarded merely as intellectual exertions, would do credit to the fine intellects which now preside at the deliberations of our own bench, while they, at the same time, exhibited minute acquaintance with case lore, the absence of which is the weak point of the Scotch judicial school. Among the questions discussed in this volume, we notice some of those intricate disputes as to preferences arising out of the notorious transactions of the Tipperary Bank; two cases relating to the custody and religious education of minors, in which the principles are stated with singular felicity; an able exposition on the law of prescription; and some very learned commentaries on the construction of wills. Lord Chancellor Napier is an adherent of the school of Lords Cranworth and Wensleydale, who are understood to hold, in opposition to Lord St Leonards, that the intention of the testator in using particular words, is to be gathered in all cases from the context of the will itself, rather than from a consideration of the supposed legal meaning of the phraseology. There can be little doubt that this is the right principle to apply to the construction of wills, as it is certainly the one which is least likely to defeat the actual intention of the testator. The other system, of deciding on the authority of cases, is liable to the criticism of Lord Bacon:—

“ Non est interpretatio, sed divinatio, quæ recedit a literâ ;  
Cum receditur a literâ, iudex transit in legislatorem.”

We regret that we are still unable to speak in terms of commendation of Mr Macqueen's reports of Appeal cases. When it is remembered that, from time immemorial, the opinions of the Law Lords have been taken in shorthand by the best reporters in London, and that copies of the written opinions, and transcripts from the shorthand writer's notes of such opinions as are not written, can always be obtained for publication, it is obvious that, in a certain sense, reports of Appeal cases might be compiled and published by persons whose qualifications for the task are on a par with those of the humblest penny-a-liner. It is scarcely to be presumed, that the House of Lords would give a handsome salary, and a monopoly of reporting in their House, to a member of the bar, if the only duty expected of him was that of revising the proofs of their opinions, and interlarding the pages with notes explanatory of their Lordships' names and honoratory titles, or of conversational remarks interesting to no human being, excepting the litigants in these particular actions. Yet this is literally all that patriotism, combined

with the affectation of learning, and stimulated by salary, has induced Mr Macqueen to communicate to the public in the first two volumes of his Reports. The statement that "the facts and arguments of the case are fully explained in the opinions of the learned judges," is the stereotyped prologue to a long reprint of the speeches, with a reference to Shaw or Dunlop's reports, but without the slightest apology for a report of the arguments of counsel, or any attempt to narrate or summarise the facts of the case,—reminding one, if we may be pardoned the irreverence of the comparison, of the formula in certain historical books of the Old Testament, "Now the rest of the acts of King Hezekiah, are they not written in the books of the Chronicles," etc. The coolness with which the author takes credit in these volumes, on the score of brevity and conciseness, for thus shirking his duty as a reporter, is only to be equalled by the audacity of his latest device for victimizing his subscribers.

It is, indeed, but fair to Mr Macqueen, to acknowledge that he is exempt from that worst infirmity of little minds, the habit of obstinate persistence in error. Only convince him that the public want to know the *facts* as well as the law of the case, and he will grapple with the stubborn chiefs as tenaciously as if he were a Lord Chancellor deciding a case which he don't understand. Nay, henceforward, this is to be a peculiar feature of his reports. Here, at least, he will transcend all other reporters, actual or possible; yet, with that just observance of the *lex parcimoniæ* inseparable from all great designs, he will also exhibit to all time a volume which may safely be characterized as the *ne plus ultra* of book-making—a work which shall demonstrate, as by a crucial experiment, the natural relation which subsists betwixt the opposite poles of redundancy of letterpress and penury of brains. It is no longer a question, "how not to do it," but how to do it with the most rigid economy of labour and mental effort, and with a result that may bid defiance to competition or complaint. It is for genius to devise, that base mechanical fellows may execute. Mr Macqueen has applied himself to the theory of law reporting as a problem of *maxima* and *minima*, and has presented us in his third volume with a solution, in which the functions of the reporter shrink to the dimensions of the "smallest assignable quantity," while all the labour is devolved upon the unfortunate purchaser of his book, who is, moreover, obliged to pay at the rate of half-a-crown per case, for the privilege of compiling a report for himself.

To maintain simplicity and unity of design throughout the complex details of an intricate subject, has ever been acknowledged to be one of the rarest attributes of genius. The plan of Mr Macqueen's third volume is so simple, that the duties of authorship might be entrusted to any printer's boy of average intelligence; his detailed expositions are so elaborate, and withal so unintelligible, that the man must be more than mortal who has patience to read them. The plan is simply this: the report consists of four parts—first, a verbatim reprint of the record; secondly, though this is sometimes omitted, a reprint of the opinions delivered in the Court of Session; third and fourthly, the speeches of the Law Lords and the judgment of the House. Of course, nobody wants to read the record as part of the report of a decided case, though it has usually been considered to be the business of the reporter to compile from it a brief and intelligible statement of the grounds of action and defence. As to the opinions of the judges, we have them in the Session cases and the Jurist, one or other of which is in the hands of every member of the profession. To oblige us to take them in the official reports of the House of Lords is only serving up “cauld kail het again,” a culinary operation, which, we may inform Mr Macqueen, is peculiarly disagreeable to the Scottish stomach. We ought to be thankful that Mr Macqueen condescends to give us the speeches of the Lords, though we should not be surprised if, in the progress of improvement, he should discover some contrivance or excuse for dispensing with these also, as he has dispensed with everything else that is valuable in a law report, whether relating to fact or argument. In short, Mr Macqueen's reports is a piece of slopwork, a thing of scissors and paste, clumsily put together, without even an attempt to conceal the composite nature of its fabric. That we may not be thought to exaggerate, we shall print entire the original matter in two or three of the reports selected at random from the last number of the current volume, leaving out nothing but the speeches, and what is avowedly and in terms matter of quotation from the printed papers. Take the report of the *Bargaddie Coal Company v. Wark*, which occupies thirty pages of the volume. Here it is *in petto* :—

The pursuer, Mr Wark of Bargaddie, in his revised condescendence, stated as follows. . . . The conclusions of the summons were as follows. . . . The pursuers' pleas in law were these. . . . On the other side, the “Statement of Facts” presented by the Company in defence was to the following effect. . . . The pleas in law on behalf of the Company, as annexed to the

above statement, were these. . . . Lord Handyside pronounced the following interlocutor on 12th June 1855. . . . The appellants, having presented a reclaiming note against Lord Handyside's interlocutor, in so far as it repelled their first and second pleas in law, the Second Division of the Court below, on the 9th February 1856, adhered to the interlocutor. Thereafter the following minute and amended minute were successively lodged for the Company. . . . The Second Division of the Court pronounced the following interlocutor on 6th March 1856. . . . Thereafter the Second Division pronounced the following interlocutor on 8th March 1856. . . . Against these interlocutors of the Lord Ordinary and of the Second Division, the Company appealed to the House. . . . Mr Roundell Palmer and Mr Rolt for the appellant. The Solicitor-General and Sir Richard Bethell for the respondent. *The arguments on both sides, and the authorities cited, are commented upon fully in the following opinions delivered by the Law Peers.*

Then follows the speeches of the Lord Chancellor and Lord Cranworth, followed by a short report of a separate discussion on a collateral topic. The report of the case of *Gammell v. The Commissioners of Woods and Forests* consists of extracts from the record, followed by a reprint of the Lord Ordinary's interlocutor, the minutes of debate, and the opinions of the consulted judges. We annex Mr Macqueen's report of the argument:—

Of the argument, a portion was derived from English law, and a still larger portion from foreign jurists. It will be found that the judgment of the House proceeds exclusively and avowedly on the law of Scotland, which (so far as relates to the legal right to salmon in the open sea, as distinguished from rivers and estuaries, and the legal right of fishing for salmon around the coast of Scotland) is sufficiently discussed in the cases prepared for the parties respectively below, and more especially in the profound opinions of the thirteen learned judges whose views have already been set forth.

It is quite evident that Mr Macqueen considers his office a sinecure. The records are so clear and accurate, the cases so learned, and the judges so profound, that he has only to discharge the pleasing duty of exhibiting them at full length, and in faultless typography, to an indulgent and admiring public. He is in the position of the sucking statesman described by a well-known novelist, who, on asking for some explanation regarding the duties of his department, was told to hold his tongue and cheer the speeches of the Ministers. This is all very fine; but we have one question to ask of Mr Macqueen before we have done with him. If reporting in the House of Lords is so easy that the editor may be content with the position of a *claqueur*, how comes it that the publication of these reports is so long delayed? The reports for the session 1859 were not issued to the profession until after the commencement of the session of 1860; and, what is still more reprehensible, the part for 1859 contains, without a word of explanation or apology, several

cases decided in 1858, and which ought to have been issued a year and a half before. We observe, moreover, that the part for 1859 is incomplete, as regards the decisions of that year. What, we ask, is the reason of this delay? Is it mere contempt for the convenience of the profession; or is not that the editor, constitutionally indolent, but conscious that he is capable of better things than the "omnium gatherum" which he annually lays before his readers, keeps back the publication in the hope of finding leisure to amend; until, when the patience of publishers and subscribers is exhausted, he rushes into print,

"Unhous'd, disappointed, unanel'd,  
With all his imperfections on his head?"

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NOTES IN THE INNER HOUSE.

WHOLE COURT.

*Greig v. Waite and Carse—24th February 1860.*

THIS case raised one of the most difficult and important questions in the law of settlement which the Court has ever been called on to consider. A man dies possessed of a settlement in the parish acquired by residence. His widow removes elsewhere, and is absent for more than four years and a day, when she becomes a pauper. The settlement which she had through her husband's residence is thus lost, and the question is, who is to keep her now? She has never acquired a settlement of her own. Is the parish liable—that in which she herself was born, or the parish in which her husband was born?

Their Lordships of the First Division, before whom the case came to depend, ordered written argument, which was ultimately laid before the whole Court. The extreme difficulty of the case is shown by the vote. Seven of their Lordships thought that the parish liable was the parish of the woman's birth; six were as emphatically of opinion that it was the parish of the man's birth.

We cannot help thinking that the result is most unfortunate. It unsettles the whole of this branch of the law, which, by a consistent series *rerum judicatarum*, was fast acquiring the character of a fixed and definite code, applicable to all the varying relations of social life. It destroys the rule on which for many years the persons charged with the administration of the poor-law have been

adjusting their accounts ; and one immediate consequence will be, that all these old accounts will have to be opened up, and actions perhaps instituted about old claims. Above all, it introduces a principle which will act as a disturbing element in the consideration and discussion of every case of settlement. We hope, therefore, that the case will be appealed. The House of Lords has set us right on some questions in this branch of the law before, and it is only due to the eminent and weighty names in the minority, that the opinion of the ultimate Court of Review should be taken on the question. Meantime, we may be permitted to examine the various grounds on which the judgment has proceeded.

It is hardly necessary to remind the reader that the claim of a pauper to relief is a claim to public charity, existing, in the first instance, against the whole community ; but the law, in apportioning the burden between different parishes, imposes it on the one with which the person destitute has a *given* connection *at the time* when the necessity for relief arises.

This elementary principle seems in this case to have been occasionally overlooked ; for we find in the printed argument considerable confusion as to the true meaning of the word settlement. It is unnecessary to inquire (as some of their Lordships do) what is its strict grammatical interpretation, or whence it has been derived. Every native of Scotland, rich or poor, has at this moment a settlement somewhere ; *i.e.*, supposing him to become a pauper to-morrow, he would be entitled to relief from some parish ; and in determining what that parish is, the rule of law falls to be applied according to the facts presented by the party's personal history at the moment when relief is sought. If he has been living for a given period in the parish, it is right that it should bear the burden, because he has been paying his rates, contributing to the wealth of the district by his industry, and relieving the wants of the other poor of the parish, so long as as he was able. But if his connection with the district was for a shorter period, the parish is entitled to say, " We have nothing to do with him, he is none of us ;" so, if he has been away for some years, it is equally entitled to repudiate the connection, and send him elsewhere for the support. This is the principle of settlement by residence. As to the length of residence, we must draw the line somewhere, and the law draws it at five years to acquire a settlement, and four years and a day to lose one so acquired. A residential settlement cannot thus be ever said to be absolutely



gained to a party. It is defeasible, and in this respect it differs altogether from a settlement which one acquires in the parish of his birth. That still remains to him as the last place of resort when every other has failed. It can never be said to be destroyed or extinguished. No doubt it is not called into requisition when a settlement has been acquired by residence elsewhere; but in the event of its being retained, the settlement by birth always remains as a sort of second parallel to fall back upon. A man may leave it the day after he is born, but it knows not when he may return; and if fifty years after—though he has roamed the wide world over in the interval—it is bound to relieve him, if he is in a state of poverty, and unless it can show that at that moment he is in possession of, *i.e.*, that he has during the interval acquired and retained a settlement elsewhere. In short, the settlement a man gets in the parish of his birth, by the mere act of coming into the world, is always liable contingently on the failure of every other.

These are said to be the two *original* settlements, and are the only two known to the statute law. However, very early in the administration of the poor-law, it was discovered that to apply them to every case, would destroy the family relation by breaking it up, and scattering its members all over the country. To avoid this, there were introduced, by means of construction, the two distinctive settlements—settlement by parentage, and settlement by marriage. Pending pupillarity, the children must be with the father. Whatever his settlement, it is theirs. At first this was confined to the case in which he held a settlement by residence; but in a leading case, *Adamson v. Barker*, the rule was extended, and the parent's settlement, however acquired, be it by birth, residence, or marriage, is that of the child until *foris familiaration*. As a wife must always be with the husband, by the marriage his settlement becomes hers. If he die the day after the marriage, and she falls into poverty, the parish bound to maintain her is *his* settlement by residence, if he had one, and his settlement by birth, if he had never acquired one. In other words, the wife's rights of settlement, whatever they were, are displaced by the marriage, and *simul ac semel* she takes *all* her husband's, whatever these may be. The case of *Robertson v. Stewart*, 12 Dec. 1854, and a host of others, might be cited in support of that proposition.

It follows, that if in the case in question the pauper's husband had died without a residential settlement at all, there can be no

question that his birth parish would be liable. A settlement gained by residence is lost by absence, but a settlement by birth never; and therefore, in the case supposed, it would have made no difference whether the woman claimed relief one year or ten years after her husband's death. The settlement she had *through* him at the date of his death would have been hers, unless in the interval she had acquired another. If so, why should the temporary holding of the defeasible settlement acquired by residence disturb the operation of the same principle? The majority of their Lordships thought that it did; because, they said, no man can have more than *one* settlement at a time. This appears to us, with deference, to be the great fallacy in their reasoning. A man *may* have more than one settlement at a time; he has always the settlement by birth contingently liable on his settlement by residence not being retained. It was not disputed in the argument, that if relief had been required within four years of the man's death, recourse must have been had on the husband's settlement at the date of his death, *i.e.*, the parish in which he died. Some of the Judges dwell largely on the fact, that the loss of the settlement was the wife's own act; she went away, they say, of her own accord, and she must be judged of after the death of the husband as an independent person. Are they to be understood as meaning, as if she had never married at all? Suppose, for instance, the loss of the settlement had been partly the husband's act, how would the principle be applied? If the man had removed from the parish, and died two years after, and the woman had applied for relief more than two years after that, the settlement by residence would, under sec. 76, be lost; for the expression, "*no person who shall have acquired a settlement by residence shall be held to have retained it,*" etc., obviously includes not only the man himself, but every person claiming *through* him in respect of his residence. If so, how would the above *ratio* fall to be applied? The loss of it cannot be said to be the wife's act; for it is as much the act of her husband as it is hers. In the interval, the widow has not had time enough to acquire a settlement of her own by her own independent residence; and if so, why should she not still hold that other right which her husband, if he had been in life, would, in like circumstances, have been entitled to exercise,—the right to fall back on the parish of his own birth?

On the whole, we cannot avoid saying that the reasoning of the Lord President and Lord Deas is quite unanswerable; and, in our

humble judgment, the opinion concurred in by Lord Cowan, Lord Benholme, Lord Kinloch, and Lord Jerviswoode, is the one which was entitled to prevail.

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#### LAW PERIODICALS.

##### THE "LAW MAGAZINE" AND THE FRENCH BAR.

THE *Law Magazine and Law Review* for last month presents the usual combination of learned discussion and light reading. The opening article, on the Management of the Inns of Court, is not likely to possess any special interest for lawyers north of the Tweed, although the financial extravagances which have roused the indignation of our contemporary might afford materials for an instructive comparison with the doings of similar bodies nearer home. The *Magazine* also contains some excellent observations on the subject of bribery, *apropos* of the report of the Gloucester Election Commissioners. The most interesting paper in this number is, however, an article on the Privileges of the French Bar, in which the circumstances which gave rise to the now famous struggle between M. Olivier and the heads of the *Palais de Justice* are made the subject of an animated and graphic description, while the reader is at the same time initiated in the refinements of political action in Paris, and is enabled by the light of historical facts to trace the growth of a new element in the public opinion. This newly-discovered principle, the development of which is dwelt upon with much ingenuity, and in a spirit of earnestness suited to the importance of the subject, is the idea of the supremacy of the law as something distinct from mere administration, and independent of the powers which control the latter. Those who have not minutely watched the present aspect of affairs in France, may not be aware that the cause of the great struggle impending between the French Bar and the Government, is the encouragement which the Bar has given to the press and the citizens to vindicate their liberties by strictly legal means, *viz.*, by invoking the protection of the courts of law in the exercise of the rights guaranteed to them by the written constitution. In a country where the judges are but too subservient to the Government of the day, it was not to be expected that the private citizen would always meet with deserved success in his contests with the sovereign power. Still, the regard which every judge must have for his own reputation, and the knowledge that every dereliction of office would be

exposed by a united Bar, jealous for the liberties of the subject, has been a powerful check upon the arbitrary tendencies of the bench ; and the result has been, that some important privileges have already been wrested from the destroying hand of autocracy. The recent decision, by which it was established that newspaper articles, for which the journalist had been warned, might be reprinted in a separate form with impunity, is a great step towards the complete emancipation of the press ; for it is a remarkable fact, that rights which have been conquered in the arena of forensic disputation are established on the surest of all bases, being universally considered to have the sanction of reason and natural justice. Despots seldom venture to tamper with the common law ; and a right established by judicial decision is more likely to last than if it had been guaranteed by fifty Acts of Parliament. We confess we look to this revival of the instinct of law among the French people as the ark of the future liberty of that country. We can never forget that the first struggles for the independence of the subject in England commenced in the Courts of Law, and at a time when these bodies were by no means remarkable for impartiality. Many of the questions now agitated in France present a striking resemblance to those which ended in the suppression of the English Star Chamber. For another of the main safeguards of English liberty, the recognition of the people's right to tax themselves, we are indebted to the Courts of Law. For while the House of Commons has protested time out of mind against the interference of the other branch of the Legislature in matters of taxation, we owe it to the integrity and liberal instincts of the English Bench, and to the exertions of a private citizen, John Hampden, that no tax-gatherer can put his hand in the pocket of a British subject without the consent of his representatives in Parliament.

The following observations from the *Solicitors' Journal* on the necessity which exists for the cultivation of the law in its more scientific branches, by members of the Legislature, are well deserving of consideration :—

#### SOME QUESTIONS OF INTERNATIONAL LAW.

The time appears to have come when the study of international law is an absolute necessity for our statesmen and jurists. A conversation upon the state of Naples, which took place in the House of Lords two months ago, afforded very convincing grounds for believing that the heads of some of our departments of State have very little notion of international questions of a legal character. It was once said, and has been often since repeated, that equity is

the length of the Chancellor's foot. Recent revelations of the state of knowledge or ignorance of our highest Ministerial functionaries, as to the principles of public and private international law, teach us that the question of peace or war in this country frequently depends upon the whim, or the misconception, or the uninformed opinion, of a Foreign Minister or a First Lord of the Admiralty. The question raised in the conversation to which we have referred, related to the duty of English naval officers whose ships were stationed in the Bay of Naples, in reference to Neapolitan subjects who claimed their protection upon the ground that they were exposed to personal danger. It appeared, by the statement which the Duke of Somerset then made, that no special instructions had been given to officers in command of ships; but he stated that the rule with regard to reception on board Her Majesty's ships was not that protection should be afforded to persons flying from justice, or desiring to escape the sentence of a court of law; but that the British flag should "afford protection to any refugee flying from persecution in any country, on account of his political opinions, either by the tyranny of monarchs or the violence of mobs." The First Lord of the Admiralty, in making this statement, was under the disadvantage of having no recognised work of authority to which he might appeal in support of it; and assuming these instructions to be sent out to the Bay of Naples for the regulation of the proceedings of naval officers in the present crisis, or anywhere else in a similar crisis, it is obvious enough, that under such a rule of conduct there would be the utmost risk that acts entirely opposed to international law and the comity of nations would take place. It is clear that it would be unsafe to make an Englishman's notion of the tyranny of monarchs the test of England's right, as a member of the confraternity of nations, to interfere with the execution of what purported to be, and what was *ex facie*, a formal and legal judgment of a constituted and authorized tribunal, in a country of which the person claiming protection was a subject. Even supposing the assumed rule to be restricted to political offences, the difficulty attending any attempt, by display of superior external force, to set aside the action of constituted authorities in any country is not diminished. Certainly the right would never be conceded in this country to foreigners to interfere with the action of our law even in cases of political offence. The rule, therefore, as stated by the Duke of Somerset, appears to require considerable modification. Perhaps that suggested at the time by Lord Derby would be sufficient for most purposes—namely, that hospitality to political refugees should be confined to times of civil disturbance or revolutionary violence. We are now not, however, concerned to inquire what the rule in this particular case should be. We are merely desirous of adducing it as a specimen of important questions which of late so frequently arise, and in reference to which, in the present state of ignorance of our statesmen about international law, we cannot but entertain serious apprehensions.



#### BILLS BEFORE PARLIAMENT.

THE following are the provisions of the bill introduced by the Lord Advocate and Sir George Lewis, to amend the law of Scotland "in regard to the relation" of husband and wife:—

1. "A wife deserted by her husband may, at any time after such desertion, apply by petition to any Lord Ordinary of the Court of Session, or in the time of vacation to the Lord Ordinary on the Bills, for an order to protect property, personal or real, which she has acquired or may acquire by her own industry after such desertion, and property which she has succeeded to or may succeed to, or acquire right to, after such desertion, against her husband or his creditors.

or any person claiming in or through his right." Lord Ordinary may allow proof before himself, or remit to a commission, and thereafter may pronounce an interlocutor giving protection.

2. Husband or creditor may apply by petition for recall of order.

3. "After an interlocutor of protection is pronounced, and duly intimated, the property of the wife as aforesaid shall belong to her as if she were unmarried: provided always, that such protection shall not extend to property acquired by the wife of which the husband or his assignee or disponent has, before the date of presenting said petition, obtained full and complete lawful possession; nor shall such protection affect the right of any creditor of the husband over property which he has before the date thereof duly attached by arrestment, followed by a decree of furthcoming, or which such creditor has, before the said date, duly pointed, and of which he has carried through and reported a sale."

4. "If any such order of protection be made and intimated, it shall have the effect of a decree of judicial separation in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued."

5. Interlocutor subject to the review of the Inner House; "and such order of protection shall, where there has been appearance by the husband, continue operative until such time as the wife shall again cohabit with her husband, or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he is willing to cease from his desertion and to cohabit with his wife; and the Lord Ordinary may require him to find security for such period as may be appointed, that he shall continue to cohabit with her; and upon the Lord Ordinary being so satisfied, and security found, if required, he shall recall the order of protection; but such recall shall not affect any right or interest acquired while the said order subsisted; and until such order be recalled, it shall not be competent for the husband to institute an action of adherence against his wife."

6. Process of separation *à mensâ et thoro* abolished. Decree of judicial separation to have the effect of a decree of separation.

7. "After a decree of judicial separation obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded; and such property may be disposed of by her in all respects as a wife may by law dispose of property so held by her; and on her decease the same shall, in case she shall die intestate, pass to her heirs and representatives in like manner as if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto, subject, however, to any agreement in writing made between herself and her husband; and the wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married; and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action after the date of such decree of separation; provided that where, upon any such judicial separation, aliment has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use."

8. In action of divorce, adulterer to be co-defender, and to be liable for expenses.

9. Lord Advocate may enter appearance in actions for nullity of marriage and divorce. Expenses not to be payable by or to the Lord Advocate.

10. "In any action for judicial separation or for divorce, the Court may, from time to time, make such interim orders, and may, in the final decree, make such

provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any children of the marriage to which such action relates."

11. In every consistorial action, the summons to be served on defender personally when not within Scotland, if he can be found; or otherwise, on the children of the marriage and next of kin.

12. In order to obtain divorce for desertion, not necessary to institute an action for adherence against defender, etc.

13. Terce claimable from burgage property.

14. "A husband shall be entitled to all the rights due by the courtesy of Scotland, although a living child shall not have been born of the marriage between him and his deceased or divorced wife."

15. Procedure in actions of aliment.

16. "When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife." Claim not competent if husband or his creditors have previously obtained possession.

17. "It shall not be competent to raise and prosecute an action of divorce, unless, first, the defender has his or her domicile in Scotland; or, secondly, the action being one for divorce on the ground of adultery, the adultery was committed in Scotland, and the defender has been personally cited in Scotland; or, thirdly, the action being one for divorce on the ground of desertion, the defender has deserted the pursuer at a time when the pursuer had a domicile in Scotland, the pursuer continuing to retain such domicile when the action is raised; and the domicile here referred to shall be held to be the domicile according to the law of which the succession to moveable estate would be regulated in case of intestacy."

18. "A decree of divorce pronounced by the Court of Session in terms of this Act shall be recognised and given effect to as a valid decree, dissolving the marriage to all intents and purposes whatever in all parts of Her Majesty's dominions, notwithstanding that the marriage thereby dissolved may not have been celebrated in Scotland."

19, 20, and 21. Court of Session empowered to make Acts of Sederunt. Repeal of laws inconsistent with this Act. Short title.

PROFESSIONAL OATHS ABOLITION.—The following are the leading provisions of the Act which has just been introduced for abolishing the oaths administered to gentlemen entering the legal profession:—"Whereas it is no longer needful or desirable that the oaths hereinafter mentioned should be imposed. It shall not be necessary for any serjeant-at-law, Queen's counsel, barrister, advocate, attorney, solicitor, writer in Scotland, proctor, clerk, or notary (or certain other persons), to take the oaths of allegiance, supremacy, and abjuration, or any of them, or the substituted oath contained in the Act of 21 and 22 Vict., either as a condition or in consequence of his being called, admitted, or practising: provided that every serjeant-at-law, barrister, or other person who would have previously taken the said oaths or substituted oath, and who shall be appointed or authorized to exercise any judicial duties, or to hold any legal office under the Crown (except that of a Q.C.), in the United Kingdom, in respect whereof he would not by any Act now in force be required to take such oaths or oath, shall take the substituted oath in a court of record or before a justice of the

peace, under the penalties mentioned in the said Act, or which would before this Act and the said Act have attached on a barrister or attorney practising without taking the oaths then required: provided that any alien or foreigner, who shall be called, admitted, or allowed to practise the above professions, shall previously take the oath of allegiance in the same manner and form in which (but for this Act) he would have taken the same or the substituted oath: (1.)

"In the case of Roman Catholics, this Act shall be construed with reference to their special oath: (2.)"

**LIABILITIES OF INNKEEPERS.**—Colonel Smythe has introduced a very excellent bill for limiting the liabilities of innkeepers. The existing law deals most harshly with them. It compels them to admit any customer who will pay for his entertainment, and at the same time makes them responsible for the character and conduct of their guests, by making them liable for any peculations they may commit upon property brought by customers into their houses. A case tried at the last assizes for Somerset illustrates the injustice of this state of the law. A guest at the Royal Hotel, in Plymouth, at a public time when every inn was thronged, went to bed without locking his door, placing his watch upon the table. During the night it vanished. He brought an action against the landlord for its value. Of course, it was contended, on behalf of the defendant, that it was the duty of a guest to take some reasonable precaution to protect his own property, and that he ought at least to have locked his door; that it could not be the duty of a landlord to place a guard at the door of every bedroom not locked, and that, without such a guard, it would be impossible for the landlord to protect the guest who will not protect himself against any thief whom the landlord might be compelled to admit into his house. The argument, though thoroughly rational, was not an answer to an irrational law; and so the landlord was mulcted in damages and costs to the amount of some L.300.

The case of *Holder v. Soulby*, reported in another page, exhibits in a strong light the unequal operation of the rule which exempts lodging-house keepers from responsibility, while laying on innkeepers a burden too heavy to be borne.

**BANKRUPTCY AND INSOLVENCY BILL (ENGLAND).**—The Bankruptcy and Insolvency Bill, as amended in committee, has been printed. Some of the principal alterations are as follows:—It is now proposed that there shall be one commissioner for the London district, throughout which the chief judge and the commissioner for the district shall have primary jurisdiction. Where a county court judge shall be vested with the jurisdiction, and discharge the duties of the present district commissioners, he is to receive, in addition to his salary as county court judge, L.300 a year, payable out of the Chief Registrars' Fund. There is a new clause for conferring upon county court registrars power to act for the judges in certain cases, in hearing and determining actions where the amount of debt or damages does not exceed 40s.; but such order is to be subject to an appeal to the judge of the court. By the 41st section, as amended, all cases of bankruptcy arising within the London district, in which the assets are estimated to exceed L.300, are to be prosecuted in the chief court; but where a case involves a smaller amount of assets, the chief judge may transfer it to the London district commissioner. In a country district, in a case where the assets are of a larger amount, it is to come before the district commissioner; but where the assets amount to less than L.300, the case is to be heard in the county court. The official assignee is to take possession of a bankrupt's estate, and is to be allowed for the wages of persons employed by him for the purpose of obtaining and retaining possession. Basinghall Street, contrary to the original scheme of the bill, is to remain the site of the chief court, and also of the London district court, which will, no doubt, be considered a concession by Mr Lawrence and others, who contend that the convenience of the mercantile community requires that the court should not be removed from the City to Portugal Street. The proceedings in any bankruptcy may be removed into a county court, on the resolution of a majority of creditors, without reference to



the amount of liabilities or assets (instead of the jurisdiction of the court, or the action of creditors being limited to estates not exceeding L.1000). The clauses relating to acts of bankruptcy for non-payment of bills of exchange and promissory notes are struck out. The clauses as to seizure and sale under an execution by the sheriff being an act of bankruptcy, are amended by compelling the sheriff, in all cases, to sell the goods by public auction, and to advertise such sale three days before it takes place. The execution creditor is to be paid the amount due to him at the expiration of seven days from sale, unless the sheriff has notice of a petition for adjudication; but if a petition shall be presented *within sixty days* after such sale, the assignees may recover back the amount from the execution creditor; *after sixty days*, the sale is not to be an act of bankruptcy. Clauses have been added to enable the court to issue a summons returnable in four days, calling upon a debtor to show cause why he should not be adjudged bankrupt upon the creditor filing an affidavit deposing to the following facts:—That a debt sufficient to support a petition for adjudication is due; that he has demanded payment, and that he verily believes his debtor is in insolvent circumstances, and setting forth his reasons for entertaining that belief. On the hearing of the summons, if the court shall be satisfied that the debtor is insolvent, it shall adjudge him bankrupt. If, after the issuing of the summons, and before the debtor shall have satisfied the court of his solvency, he shall pay the creditor any money on account of such debt, and the debtor shall be adjudged bankrupt upon his own petition, or on the application of any other creditor, *within sixty days* after the issuing of the summons, the assignees shall recover back all money so paid. The court is to have full power to award costs to either party on the hearing of the summons. Creditors' assignees are not to be paid remuneration, but shall be selected from the body of creditors, and allowed to appoint a manager (not being an official assignee or solicitor), to wind up the estate under their direction and responsibility, and such manager is to be paid out of the assets realized. The stamp duty payable upon petitions for adjudication in the chief court, or county district court, is to be L.5, half of which sum is to be returned if the assets do not exceed L.300. Petitions in the London district court, or a county court, are to have a stamp of L.1. (In the bill originally, *all* petitions for adjudication were to pay a L.10 stamp duty, half of which was to be returned where the assets did not exceed L.300.)—*Solicitors' Journal*.

## THE MONTH.

Reform Bill—Titles to Land—Dundee Sheriff Court—Colonial Appointments—Law of Husband and Wife Amendment Bill.

THE great event of the month is the accomplishment of the second reading of the Reform Bill, which is destined, if carried, to effect so important a change in the electoral law of the United Kingdom. We have not considered it necessary to join in the discussions raised by some of our professional contemporaries regarding the merits or demerits of this important measure. One of these journals, while professing neutrality in matters political, has lately made itself conspicuous by the intolerant animosity of its attacks upon the Bill, and all connected with it, whether as approvers or promoters. The animus of this journalist, unable to brook the con-

ventional restraints of the editorial style, has found relief in inviting and publishing a series of anonymous epistles from political agents, in which the unenfranchised citizens of England are assailed with every variety of coarse and violent invective. Another pet scheme of this non-political journalist for arousing the class prejudices of his readers deserves exposure. It consists in the systematic and reiterated impeachment of the Government Electoral Returns, in order to give some colour to its asseverations, that the provisions of Lord John Russell's Bill are equivalent to universal suffrage. Those of our readers who take any interest in politics, must be aware that every argument which ingenuity sharpened by selfishness could bring forward to invalidate these returns, has completely broken down; and that the discussions which have taken place in Parliament, and the explanations which have been given, tend only to strengthen the internal evidence which these documents contain of having been honestly and accurately compiled. According to the returns, the new franchise will only add 50 *per cent.* to the electoral body; and it has never yet been asserted in any quarter, on the assumption of a Reform Bill being necessary (which is of course an open question), that 50 *per cent.* is too great an increment to add to the existing constituencies. Hence the necessity for misrepresentation, in order to give the Bill a revolutionary colour. It would be out of place in these pages to offer any opinion as to the expediency of the policy to which the Liberal party is now committed. But we are entitled to protest against the system which has been so industriously pursued, of misleading the public as to the true nature of this important measure of national policy. One of the latest arguments against the authenticity of the returns is so shallow, that it has only to be clearly stated in order to be seen through. The return gives in separate columns the number of occupants at and under L.10 and L.6 respectively. On examination, it turns out that the number of L.10 qualifications, as stated in the return, is very much less than the number of registered L.10 voters. Thus, say the opponents of the bill, the returns are proved to be fallacious. The number of existing electors is in excess of that stated in the return, and it is apparent that the number of L.6 electors must be understated in the same proportion. We do not allude to this fallacy merely for the sake of recalling Mr Gladstone's happy rejoinder, in which he demonstrated that, as the error affected both columns in a nearly equal degree, the numerical differ-

ence between the two columns (which represents the *addition* to the constituencies) will remain nearly as before. But the fact is, that the addition to the constituencies will be much less than the returns indicate. A very large number of L.6 householders are already on the roll, the qualification being eked out by the addition of a bit of land, or by clubbing two houses or a house and shop together, to make up a L.10 qualification. To such an extent has this system been followed in the smaller burghs, that in many of them there is scarcely a house which does not already contribute to make up a L.10 qualification; and we have been informed by persons who are conversant with electioneering operations in those paradises of constitutional liberty, that the Reform Bill would make no appreciable difference in such constituencies. In the large towns there would, of course, be a considerable increase; though the classified return obtained for the city of Edinburgh shows that the new qualifications thus obtained represent tenements occupied by persons in every variety of social life; and that, after giving the widest scope to the measure, the educated class would still be able to hold a respectable majority on the electoral roll. This result ought to satisfy the scruples of those who object to putting a preponderant power into the hands of any one class of the community—scruples which accord with our own convictions, and which confirm us in the opinion that the monopoly of power claimed for “the middle classes” in certain quarters may be quite as dangerous and as unconstitutional as the democracy for which so much contempt is professed.

The Titles to Land Bill, as altered in committee, is so far improved that it may be allowed to form an adequate sequel to the Act of 1858. We regret, however, to observe that it is still proposed to give the town-clerks the same fee for recording a conveyance as they were in the habit of charging for preparing and recording the deed of infestment. The proviso, that town-clerks shall be bound to prepare conveyances without additional fees, is really no concession; because there are few clients who would be disposed to take the business of preparing a conveyance out of the hands of a confidential agent, to entrust it to one who may be a comparative stranger; nor is it reasonable to expect that agents would advise such a course to be taken. As to the provisions for accumulating surplus fees, we fear they are illusory. The true principle is to make a moderate deduction from the fee on the score of the saving of expense that must accrue to the town-clerks on being released from the trouble of preparing infestments.

This reduction should take effect at once ; and, of course, the fees should be still further reduced in the event of new appointments being made subsequent to the period fixed in the Act.

We understand that a report has been already presented by Mr C. F. Shand, on the subject of the business of the Sheriff Court at Dundee. The substance of Mr Shand's report is, that the business of the Court is not in excess of what one Sheriff ought to overtake. If this report be well-founded, there are but two courses open to the resident Sheriff. Either it is his bounden duty to clear off arrears without delay ; or, if he cannot, he ought to take steps which will give the public the benefit of the services of those who are able to keep pace with the requirements of the times.

We are glad to learn that the Government has determined on recognising the claims of Scotch lawyers to a share of the colonial patronage. The appointment of Mr Shand to the Chief-Justiceship of Ceylon is an earnest of the policy of fair play in such matters ; and we have no doubt that Mr Shand, whose professional skill and experience are well known in Edinburgh, will be so well appreciated in the country of his adoption, as to do credit to the choice of the Government, and disarm all opposition from the English vested interests.

Amongst the measures of law reform which are likely to pass into law during the present session, there is an important bill for the amendment and consolidation of the statute law relative to offences against the coin, and also the Husband and Wife Bill (Scotland), which we print in another page. The object of the last-mentioned measure is twofold : first, to introduce uniformity into the law of the United Kingdom in relation to the earnings of married women, who are dependent on their own labour for their support ; and, secondly, to improve and simplify the procedure in consistorial cases. The first of these objects is effected by a series of clauses similar to those of Lord St Leonards' Act for England and Ireland. We imagine there will be but one opinion as to the propriety of extending this most righteous enactment to Scotland ; and we would even add, that Parliament owes some concession to the married ladies of Scotland, in consequence of the summary and not very creditable way in which their right to dispose of their share of the goods in communion was smuggled out of the statute-book ; and this, too, in an Act which professed to deal only with "intestate succession." The present bill, however, is no concession, but the tardy acknowledgment

of a natural right ; and the only doubt is, whether the provisions of the bill are not too much hampered by restrictions, intended to protect the rights of creditors, but which may be used to defeat the honest intention of the promoters of the bill.

The provisions with reference to divorce practice are in the main improvements, though perhaps the greatest improvement of all would be a clause (if such could be devised), compelling the judges to give effect to the provisions of the Judicature Act for trying such cases by jury ; or, what would be better still, enabling the Lord Ordinary to try such causes before himself without the intervention of a jury, and without requiring the consent of the parties. Under the present system, the proof is considered by judges who have no opportunity of forming an opinion on the value of the testimony, from personal observation of the demeanour of the witnesses. That such obsolete methods of probation should be allowed to continue in reference to a class of cases where the inducements to perjury are at the point of maximum intensity, is a blot on the administration of justice in Scotland ; and we earnestly hope the Lord Advocate will avail himself of the present opportunity of assimilating our procedure to the improved methods which have been adopted with so much success in the English Court of Divorce. We would also suggest to his Lordship the propriety of introducing into our law some of those equitable exceptions to the right of divorce which are recognised by the English Act. These exceptions were not the offspring of experimental legislation, but were borrowed from the practice of the House of Lords, whose code of procedure was the result of centuries of experience, and has received its sanction from the House of Lords sitting as a legislative body, unfettered by the strict rules of law which are obligatory on that House in its judicial capacity. The exceptions which we would desire to see introduced are these. It should be in the *discretion* of the Court to refuse to pronounce decree and sentence of divorce, in the event of the judge being satisfied that there has been adultery on both sides ; or—where the action is at the instance of the husband—in the event of its being proved in exculpation that the husband had deserted his wife prior to the act of adultery, or had treated her with such harshness and cruelty as would entitle her to the remedy of a judicial separation, or had himself set the example by conduct approaching to infidelity, though actual adultery were not proved against him. With these additions, and with a somewhat more strict definition

of the limits of jurisdiction than that attempted in the Bill, the Scotch Marriage Law may still maintain its supremacy among the codes of modern times, notwithstanding the boasted improvements of rival systems.

## Legal Intelligence.

**LEGAL APPOINTMENTS.**—The political office of Crown Agent, vacant by the death of Sir John Melville, has been conferred on Andrew Murray, Esq., W.S., of the firm of Murray and Beith.

We understand that Charles Farquhar Shand, Esq., of the Scotch Bar, is about to be appointed Chief Justice of the Supreme Court in the Mauritius.

The Queen has been pleased to confer the honour of knighthood upon James Plaisted Wilde, Esq., lately appointed one of the Barons of Her Majesty's Court of Exchequer.

The Queen has been pleased to appoint Adams G. Archibald, Esq., to be Attorney-General; Joseph Howe, Esq., to be Provincial Secretary; William Annand, Esq., to be Financial Secretary; Jonathan McCully, Esq., to be Solicitor-General; and John H. Anderson, Esq., to be Receiver-General, for the Province of Nova Scotia.

**THE NEW STAMP ACT.**—The following correspondence regarding the operation of the New Stamp Act has just been published:—

“Manchester, April 26, 1860.

“SIR,—Under the Stamp Act I delivered to the Lancashire and Yorkshire Railway Company an inland stamped order for a parcel of cotton in Liverpool, to be consigned to my order here. I sold the cotton here and gave an order to the company to deliver it. They refused to obey my order to deliver it without another stamp. I do not think your law contemplated a series of stamps, i.e., a stamp on every transfer delivery. I shall feel much obliged by your informing me if I am right or wrong.—I have the honour to be, etc. “T. EGAN.

“To the Right Hon. W. Gladstone,  
Chancellor of the Exchequer.”

“11, Downing Street, Whitehall, 4th May 1860.

“SIR,—With reference to your letter of the 26th ultimo, I am desired by the Chancellor of the Exchequer to acquaint you that an order by the owner of goods to a railway company for a parcel of the goods to be consigned to his order at a particular place not being on a sale or transfer is not liable to a stamp, but an order afterwards given to deliver them to a customer is liable, provided the goods are lying in a wharf or warehouse described in the Act.—I am, Sir, your obedient servant,  
“CHARLES L. RYAN.

“T. Egan, Esq.”

**GLASGOW FACULTY.**—The Procurators of Glasgow have lately elected Andrew Bannatyne, Esq., Dean of Faculty, in room of the late Alex. Morrison, Esq.

**THE RECENT FAILURE IN ABERDEEN.**—The sad consequences of the great failure of the firm of Messrs John and Anthony Blaikie, advocates and land factors in Aberdeen, are, we learn, daily becoming more apparent. As has been stated, the total amount of the shortcomings is set down as at least L.300,000; and in this sum, it is reported, is swallowed up and swept away the savings of tradesmen; the scanty portions of widows and spinsters of families who have seen better days; the rents of many large landed proprietors, and money freely

given, so 'tis said, to be invested in security and on bond. As bounding these classes of sufferers, it may be mentioned that a young and clever architect of the city, brought chiefly into notice by the firm, is a loser to the extent of L.200; while a noble Earl, well known in the Free Church religious community, and who takes his title from a royal burgh not 20 miles distant from Aberdeen, is stated to be in for not less than L.100,000. Mr Blaikie is a member of a family who, for half a century at least, have held the very highest name and credit in the north of Scotland. His father and his uncle—men of untainted reputation and honour—both for years held the office of Lord Provost of Aberdeen; his brother-in-law is one of the most popular and eminent Free Church ministers in the same place; while he himself was looked upon, and deservedly, as one of the kindest-hearted and ablest business men in his native city, and, as such, a great favourite amongst all classes. In the county as in the town, Mr Blaikie was held in much estimation. He was Commissary-Clerk for Aberdeenshire—a sinecure office which yielded L.500 yearly; and the extent of the private business of the firm may be inferred from the circumstance that they employed nearly twenty legal and other assistants. It is but right to state that, while as yet nothing seems to be known of the whereabouts of Mr John Blaikie, his younger brother and partner, Mr Anthony, remains at his post, using every effort to get matters into the best order possible. It is understood that the failure of Mr Blaikie was like that of other gentlemen of his class, caused by speculation in hazardous investments, a fact which ought to convey a moral to those who are entering on professional life.

CHARITY COMMISSION.—The Seventh Report of the Charity Commissioners has been laid before Parliament. It gives a satisfactory account of the work of 1859 in the important department intrusted to this commission. In the course of that year 1091 applications were made to the Board for their assistance or intervention, and 1508 orders were made, and particulars were obtained of 334 charities of which no public record had been previously made; but, unfortunately, annual accounts cannot be procured from charities generally. The charitable funds transferred to the official trustees now amount to L.593,730 stock, all Government funds or Bank stock, except L.3000 London and North-Western Perpetual Debenture Stock. But the official trustees labour under the disadvantage of not being by law enabled to take real estate without the expense being incurred of an application to some competent court to make an order for that purpose—a disability which the commissioners think should be removed, in order that the charities may have the benefits of such a transfer, among which are changes of the administering trustees without the usual conveyances and increased economy and ease in granting leases, together with facilities for vesting the management of charity estates in incumbents and churchwardens, for example, who have no joint corporate character for such purposes, and therefore could not take the estates in succession. The commissioners have provisionally approved a scheme for the reconstitution of Archbishop Tenison's library and school charity, by the sale of the library and appropriation of the produce to the maintenance of an improved and more comprehensive school. The Board have done much in correcting irregularities and errors in the administration of charities, checking litigation and improvidence, and causing a more efficient system of management, but suggest further legislative improvements in the same direction. They suggest that further powers might be vested in them with a view to the employment of efficient trustees, and the establishment of defined and authoritative rules of management without recourse to the judicial courts being necessary, except in cases of a contentious character, or involving questions of right, together with a simple and expeditious mode of removing incompetent or improper masters of endowed schools. They think also that there might be a moderate relaxation of the rule of law which prohibits any diversion of the funds from the specific objects prescribed by the founder. May we not again inquire, Why are the functions of this most useful commission not extended to the whole United Kingdom?

**BUSINESS OF THE ENGLISH COURTS.**—The following extract from Lord Chief-Justice Cockburn's letter to Lord Campbell on the Divorce Bill will give some idea of the amount of work which English judges have to perform. Would that it might stimulate the judges of our own country to greater activity :—

"The fact is, that at the present time the judicial establishment in the superior courts of common law is not more than barely adequate to the discharge of those duties which were incidental to the judicial office before this new duty was imposed on them.

"For though it is true that the county courts have, to a considerable extent, relieved the superior courts of a large extent of the lighter and less important cases, yet the amount of business in the latter never was heavier than at the present moment. The increase of population and of commercial and manufacturing activity, the multiplication of inventions and patents, the right recently conferred on the representatives of deceased persons, where loss of life has resulted from negligence, to bring actions for compensation, the facility afforded by railways for bringing causes to London for trial, with other circumstances unnecessary to detail, produce an amount of important business which presses heavily on the courts; more especially as the modern changes in our procedure (I allude more particularly to the examination of parties, which leads to the calling of witnesses for the defendant in almost every case, and to the allowing of second speeches to counsel for defendants), while tending materially to promote justice, have, on the other hand, a necessary tendency to prolong proceedings in court, and to occupy time. Besides this, new duties have been thrown on the court; for instance, on the Court of Queen's Bench, by the power of appeal from the decision of magistrates in petty sessions, given by the Act of 20 and 21 Vict., which, added to the former appeals from Quarter Sessions, produces an amount of Crown business which occupies the court two days a week in every term; on the Court of Common Pleas, by the reference to that court of questions arising on the Railway and Canal Traffic Acts, and of appeals from the decisions of revising barristers.

"The effect of the whole is, that the utmost diligence and activity of the judges is no more than adequate to prevent the accumulation of arrears to a serious and mischievous extent.

"In term time it is, as your Lordship is aware, absolutely necessary that *nisi prius* sittings should be constantly going on. One judge in each court being thus employed, four would be left for the sittings *in banco*, were it not that, during one half of the day, another judge is required to attend chambers, whereby the number is reduced to three. I trust your Lordship will concur with me in thinking that the number of the judges for sittings *in banco* ought not to be reduced below the ancient and accustomed number. It is the unanimity of so many as four judges, or in the event of difference, the proportion of the majority, which has given so much authority to the decisions of these courts. It is, no doubt, impossible to prevent the number from being at times reduced to three by the incidents to which I have referred; but when it is considered that the court, on applications for new trials, is practically a court of appeal from the ruling of single judges, or from the decisions of juries, that it is often called upon to decide difficult and complicated questions of law, and to settle the construction of important Acts of Parliament, I feel assured I shall have the sanction of your Lordship's opinion in saying that the number of the sitting judges of each court ought not to be intentionally reduced below three. Yet the withdrawal of one of the judges for the purposes of the Divorce Court has necessarily the effect of reducing the number to two during a portion of every sitting, and, in case of absence by ill-health or other casualty, would have the effect of reducing the court to a single judge, or as the alternative, of preventing the sitting at *nisi prius* or attendance at chambers.

"Out of term the inconvenience is still greater. The state of the cause-lists necessitates, as your Lordship knows, the constant sitting of the two courts. Attendance at chambers continues to be as necessary as in term. Post-terminal



sittings *in banco* are indispensable to dispose of the arrears of term business, and at this period occur the sittings of the Court of Error in the Exchequer Chamber, in which the presence of as many judges as possible is most desirable, and less than six ought not to be dispensed with. Any one of these important courts may be suspended by the withdrawal of two judges (or even of a single one) from their proper and primary duties.

"I have omitted to advert to the sittings of the Central Criminal Court, as well as to the recently established Court of Criminal Appeal, which constitute an additional drain on the strength of the judicial establishment.

"These explanations, of which fortunately no one can be better qualified to form a correct estimate than your Lordship, will, I conceive, fully bear out the opinion expressed by the judges as the result of their practical experience."

## Digest of Decisions.

### COURT OF SESSION.

#### FIRST DIVISION.

HAMILTON AND CO. *v.* LANDALE.—May 12.

#### *Maritime—Master's Implied Mandate.*

In the year 1855 the ship "Araminta," of Glasgow, was owned in the following proportions—viz., 16-64ths by James Landale, farmer, Woodmill, Fife, 32-64ths by Hamiltons and Co., merchants in Glasgow, 8-64ths by Laughland and Brown, shipbrokers in Glasgow, and 8-64ths by Mrs Mary M'Arthur, Glasgow. Laughland and Brown acted as ship's husbands, and under their directions and superintendence certain repairs were made on the ship in June and October 1855. The funds for executing these repairs were supplied by the part owners, Hamiltons and Co. On being applied to for his share of the expenses of repair, Landale refused to pay it, denying that the ship's husbands had any authority to incur them. On the other hand, it was stated that Landale was in the knowledge of the repairs, and acquiesced in their being made. An action having been raised by Hamilton and Company against Landale, a discussion took place as to the form of the issue for trying the case—the defender maintaining that it was necessary to put "authority" in the issue, which, however, might be either expressed or implied, according as the evidence at the trial should show the repairs to have been of an ordinary or extraordinary kind. The Court were of opinion that, while a ship's husband has implied authority to make ordinary repairs, he must have special authority for extraordinary repairs; of which kind the present repairs were would appear at the trial. They, however, held that it was unnecessary to insert "authority" in the issue, as "resting—owing" reserved to the defender all his defences. The following is the issue approved of by the Court:—"It being admitted that in February 1854 the defender became part owner, and that he continued to be a part owner, of the ship "Araminta" of Glasgow, to the extent of 16-64th shares of said ship, until the 6th day of February 1860: "Whether, in the months of June and October 1855, and in the intervening

months of the said year, the said ship was repaired at an expense to the owners of L.5599, 14s. 2d., or part of the said sum; and whether the defender, as having been part owner as aforesaid, is resting-owing to the pursuers, as disbursers of the said expense, and as assignees of Laughland and Brown, shipbrokers in Glasgow, managing owners and ship's husbands of the said ship, the sum of L.1399, 18s. 6½d. as the defender's share of the said expense, with periodical interest down to 30th November 1856, amounting in all to the accumulated sum of L.1457, 2s. 7d., or part thereof, with interest on the said accumulated sum from and after 30th November 1856 till paid?"

APPEAL IN WATSON'S SEQUESTRATION.—*May 12.*

*Bankruptcy—Mandatory.*

In the sequestration of John Watson, writer, Alloa, Robert Chalmers, shoemaker there, was a claimant for L.192. He died on 29th September 1859, leaving a trust-disposition and settlement, and the appellants are his trustees. On the 11th October all the creditors, except the mandatory for the appellants (who are a majority in value), voted to accept an offer of composition, and their vote was objected to on grounds which Sheriff-substitute Bennet Clark thought valid. In his interlocutor he "finds that the said trustees had not, at the time of said meeting of creditors on 11th October last, expedite confirmation; and that not having acquired an active title to the said sum of L.192, 0s. 2½d., which had been claimed by the truster, the said Robert Chalmers, their author, they were not qualified to appear by a mandatory and vote at said meeting: Finds that even although the respondents, the trustees, stood in the same position with their author, and could found upon his claim and oath in this sequestration, that the same is defective, in respect it contains an item of L.18 of expenses, said to be included in and due by the extract decree which is the foundation of the claim, but which is not only not vouched by said extract decree, but is proved not to be due: Therefore finds that said claim and affidavit are not in terms of the Act of Parliament, and are insufficient to support the vote of a party founding thereon." The Court recalled this deliverance, and remitted to the Sheriff-substitute to hold the vote valid—Lord Ivory, who delivered the judgment of the Court, stating that he did not consider confirmation necessary; and that if there was an error in the oath, the Sheriff-substitute was bound by the 51st section of the Bankruptcy Act to *point it out*, and have it rectified.

FENTON v. LIVINGSTONE.—*May 15.*

*Domicile—Legitimacy.*

It will be remembered that the House of Lords reversed the judgments of the Court of Session in this important case as to the right of succession to the estates of Bedlormie and others. Mr Fenton has now applied to have the judgment of the House of Lords applied, and decree given that the late Alexander Livingstone was not the lawful child of the deceased Thurstanus Livingstone, brother of Sir Thomas, the last baronet; and that his pupil, Sir Alexander Thurstanus Livingstone, is not entitled to succeed to the said estates. No appearance was made for the pupil, and it was proposed that the Court should consider the case *ex parte*. Lord Ivory suggested that, in the shape which the case had assumed under

the judgment of the House of Lords, it was necessary to decide whether, by the law of Scotland, marriage with a deceased wife's sister was incestuous. That was one of the most important questions which had ever come before the Court. As there was no contradictor, he (Lord Ivory) thought the argument should be in writing or before the whole Court. The Court, without expressing any opinion, ordered Fenton to give in a minute stating the judgment he demanded from the Court, and the grounds on which he rested his demand.

APPEAL ON CUTHBERT'S SEQUESTRATION.—*May 16.*

*Bankruptcy—Delegation—Notice.*

The trustee on the sequestrated estate of David Cuthbert, manufacturer, Arbroath, appeals against the allowance of a claim by the Sheriff-substitute of Forfar, of L.934, said to be due to the British Linen Company, under three bills drawn by the firm of Cuthbert, Mill, and Walker, of which firm Cuthbert was a partner at the date of the bills, but left it before they came due. The remaining partners, Mill and Walker, were to pay the debts of the old firm. Before the bills fell due the acceptors became bankrupt, and a docquet was appended by Mill and Walker dispensing with notice, and accordingly no notice was made to Cuthbert. The trustee refused to admit the debt—(1.) because the bank had delegated the debt to the new firm of Mill and Walker, and relieved Cuthbert; and (2.) because no notice of the acceptor's failure to pay was made to Cuthbert. The Court held, affirming the judgment of the Sheriff-substitute, that there was no evidence of delegation; and that the docquet by Mill and Walker, whether with Cuthbert's knowledge or not, dispensed with the necessity of notice.

M'DONALD v. THE DUCHESS OF LEEDS AND CAPTAIN CHISHOLM.—

*May 16.*

*Damages—Ejection of a Tenant via Facti.*

This was an action at the instance of Angus M'Donald, tailor, against the Duchess of Leeds, and her factor, Captain Chisholm, for his alleged illegal ejection from a house in which he was residing in Milltown of Applecross. The defence was, that the house from which M'Donald was ejected belonged to the Duchess, and that he had gone into it without any legal title to do so; and that having been repeatedly warned to remove, he was lawfully ejected, though no legal process had been obtained for that purpose. The pursuer set forth that the house in question was built by one John M'Donald, and that he went into it with the consent of his son and daughter. The Lord Ordinary (Jerviswoode) reported the case on issues; and the Court, after hearing counsel for the pursuer, held that there was no issuable matter on record, and therefore dismissed the action as laid.

MRS MILLAR v. SHARPE.—*May 17.*

*Exchequer—Jurisdiction.*

The collector of assessed taxes in Glasgow pounded the furniture in 1858 in the house No. 24, Jamaica Street, Glasgow, for "inhabited house duty" due by Miss Jemima Johnston, who occupied it during the year 1857. Mrs Millar obtained interdict against the sale in the Sheriff Court

of Glasgow, and was proceeding in that Court to prove that the furniture belonged to her. The collector objected to the jurisdiction of the Sheriff Court, applied to the Court of Session for interdict against the proceeding in the Sheriff Court of Glasgow on the ground of incompetency, and obtained it from Lord Ardmillan, who held the Court of Exchequer the only competent court; but his interlocutor was recalled by consent of the Inner House, and the interdict was refused *in hoc statu*. Mrs Millar proved that the furniture belonged to her; and the defender refused to lead any evidence on the merits, and has presented another application for interdict in the Court of Session for the same purpose, again denying the jurisdiction of the Sheriff Court, which objection was stated in the Court and repelled, the interdict now sought being against Mrs Millar for acting on the Sheriff's judgment. Her counsel pled for her that the judgment of the Court refusing the previous application for interdict is *res judicata*, and that the suspender, by appearing in the Sheriff Court, is personally barred from denying its jurisdiction. The Court, after argument, superseded consideration, to allow the Crown to bring the whole proceeding before the Sheriff into this Court.

GRANT v. REID AND TAYLOR.—*May 25.*

*Poor—Settlement.*

This was an action between the parishes of Leuchars, Kilmalie, and Kincardine O'Neil as to the liability for the support of an imbecile pauper named Stewart Gordon, who was born in the first mentioned parish. The pauper's father was born in Kincardine O'Neil, and died in 1840. His widow, the mother of the pauper, after her husband's death resided for nearly six years, prior to Whitsunday 1846, at Fort-William, in the parish of Kilmalie, thereby acquiring a settlement for herself and the pauper who lived with her as a child in the family. Mrs Gordon was absent from Kilmalie from Whitsunday 1846 to the autumn of 1847. At the latter date she returned to Kilmalie and lived with her brother at Annal in that parish till Whitsunday 1848, when she went to Glasgow, chiefly for the purpose of purchasing furniture for the house which she had taken at Fort-William. She took up her residence for the second time at Fort-William on July 13, 1848, and remained there till Whitsunday 1849, when she again left it and went to Dumfries, where she died in May 1857, having acquired no settlement there. The question, therefore, came to be whether Mrs Gordon's absence from Kilmalie from May to July 1848, prevented her residing continuously for one year in that parish. The Lord Ordinary (Ardmillan) held that it did not, regard being had to the objects of the absence, and the Court adhered, though holding the question one of considerable difficulty. The support of the pauper falls on Kilmalie. The Court found the parish of Kilmalie liable in expenses to Leuchars, and remitted to the Lord Ordinary to decide the question of expenses between Kincardine O'Neil and Leuchars.

## SECOND DIVISION.

CRAWFORD *v.* BEATTIE.—*May 12.**Poor—Settlement—Forum.*

This was an action at the instance of the Inspector of the parish of Eaglesham against the Inspector of the parish of Barony, in order to its being declared that a certain pauper lunatic had his settlement in Barony. Two preliminary defences were stated to the action in consequence of the following circumstances:—In the year 1856 the parish of Govan, which was then supporting the pauper in Gartnavel Lunatic Asylum, made a claim to be relieved of his support against Eaglesham, as the parish of the pauper's birth, and against Barony, where, as stated by Eaglesham, the pauper had acquired a residential settlement. In order to obtain a speedy and inexpensive settlement of this question, it was proposed by the Inspector of Eaglesham that it should be disposed of in the Small Debt Court at Pollockshaws, and Mr Meek, then Inspector of Barony, consented to this. A small debt action was accordingly raised by Govan against Eaglesham and Barony, concluding for L.9 odds, being the amount of advances made up to that date, and on 12th December 1856 the Sheriff-substitute decreed against Eaglesham and assoilzied Barony. Eaglesham paid the contents of the decree, and continued to support the pauper for two years thereafter before raising the present action. Barony accordingly pled *res judicata* and *homologation* as exclusive of the action. The Lord Ordinary Kinloch repelled both pleas. The Lord Justice-Clerk said that the arrangement founded on was not binding on the parish of Barony, and might have been repudiated by that parish, as there was no evidence that the Parochial Board had ever authorized their Inspector to enter into any arrangement by which their liability for the permanent support of the pauper was to be regulated by the Small Debt Court decision. Lords Wood, Benholme, and Cowan concurred.

HUTCHESON AND CO. *v.* THE GREAT NORTH OF SCOTLAND FISHERY COMPANY (LIMITED).—*May 15.**Process—Notice of Trial.*

This was an action of damages, arising out of a collision between two Clyde steamers, and was reported to-day by Lord Ardmillan upon a question which had arisen between the parties as to the time when the trial should take place. The pursuer had given notice of trial at the end of last session, had countermanded that notice, and had given another notice of trial for the jury sittings at the end of the present session. The defender wished the case to proceed to trial immediately before the Lord Ordinary. The Court fixed the trial to take place on the 21st June, holding that the policy of the law was, that actions should proceed to trial without delay as soon as issues had been adjusted, and that, looking to the whole circumstances, it was the fairest and most expedient course not to allow further delay.

MAGISTRATES OF DUNDEE *v.* MORRIS AND OTHERS.—*May 23.**Charitable Bequest—Nobile Officium.*

In order to carry out the judgment of the House of Lords in this case, the Court in June last remitted to Professor Campbell Swinton to frame

and report a scheme for the erection and endowment of an hospital in Dundee for the education and maintenance of 100 boys. The reporter has reported that it will be necessary for this purpose to set aside L.72,000 of the estate left by the testator, the late Mr John Morgan. Of this sum it is proposed to expend L.13,500 upon the erection and furnishing of the building, plans for which, of a plain though elegant and complete character, have been prepared by Messrs Peddie and Kinnear, architects. The report contains provisions for the constitution of the governing body of the hospital, for a body of visitors, and for a staff of officials. The Magistrates of Dundee and Mr Morgan's heirs have objected to the report, and the Court delayed the case, in order to consider whether it might not be necessary to have more information from the reporter in regard to the points in his report to which objections had been stated.

DOBBIE v. JOHNSTON AND OTHERS.—May 25.

*Diligence—Privilege.*

In this action, arising out of the concerns of the Edinburgh and Glasgow Bank, the Court had granted a diligence to the pursuer, entitling him to recover, generally, all books containing a record of the transactions, etc., of that company, for the purpose of making extracts therefrom to support the pursuer's averments. Mr Hastings, accountant in the office of the Clydesdale Bank, being examined as a haver before the commissioner, objected to the production of certain of the books, in so far as regarded entries made subsequent to the amalgamation of the Edinburgh and Glasgow Bank with the Clydesdale Bank, on the ground that these entries were the property of the Clydesdale Bank. The commissioner sustained the objection, and the pursuer appealed. For the pursuer it was argued that these entries fell under the specification; for the Clydesdale Bank it was maintained that the inspection of these accounts might be troublesome and disadvantageous to their customers, and that they had a right to oppose it, as the specification really applied only to entries previous to the amalgamation. Lord Wood held that it was impossible to limit the examination of the documents to a certain date. The question was, what was the real state of the bank at that time? Subsequent entries might prove whether or not the bank was really worth anything at that period. There was a hardship no doubt with regard to the parties now dealing with the Clydesdale Bank; but it could not be maintained that the documents of a subsequent date were to be received. The other judges concurred, the Lord Justice-Clerk observing, that his only feeling had been from a regard for the interests of the Clydesdale Bank; but this feeling had been obviated by the reflection that the Clydesdale Bank had taken over the business of the Edinburgh and Glasgow Bank after it had stopped payment, and in circumstances which showed that questions like the present, as to the past management and ultimate fate of the bank, must almost necessarily arise.

## APPEALS IN THE HOUSE OF LORDS.

Mrs JANE DONALDSON OF MAXWELL, *Appellant*, v. SAMUEL M'CLURE, *Respondent*.—  
(7th March 1860.)

The question raised in this case related to the domicile of succession of a party whose wife had died intestate, prior to the date of the Moveable Succession Act, 1856.

Mr M'Clure, the respondent, was a native of Scotland, and early in life went to Wigan, where he was a draper. He married the daughter of a banker residing there, but who had himself been born in Scotland. Mr M'Clure resided near Wigan, and was a member of the corporation, as well as a justice of the peace. In 1848, a railway company, under the compulsory powers of their Act, acquired his house. His wife's health was at that time delicate; and not finding a suitable house near Wigan, he bought a house at Laurelmount, near Dumfries (the place of his birth), transferred his domestic establishment to his new house, became connected with the town of Dumfries, and enrolled his name as a voter for the county. He lived there with his wife during the greater part of every year. In 1851 she died, and was buried there. During three years that he lived there, he and his wife went twice a year to Wigan, and stayed there some weeks at a time. He still had a house there. He also paid frequent visits to Wigan of a few days at a time, besides those he made along with his wife. He was still in the commission of the peace at Wigan, and was connected with that town. The house at Wigan was kept always ready for his reception. The wife's next-of-kin claimed a sum amounting to L.20,000, for the half of the goods in communion. The Court of Session held that his domicile had not ceased to be English, and dismissed the suit.

The appeal was brought in *formâ pauperis*.

Mundell and Adam, for the appellant, cited *Somerville v. Somerville*, 4 Ves. 30; *Anderson v. Laneauville*, 8 Moore P. C.; *Hodgson v. De Beauchessne*, 8 Moore P. C.; *Forbes v. Forbes*, 1 Kay 16, s. c. 6 W. R. 92; "Phillimore on Domicil."

The ATTORNEY-GENERAL (Sir R. Bethel), and ANDERSON, Q.C., for the respondent.

The House unanimously affirmed the interlocutor of the Court of Session. The legal doctrines involved in this decision are concisely stated by Lord Wensleydale, whose opinion is subjoined.

LORD WENSLEYDALE.—If the question here had been which of the two houses, the one at Wigan or the one in Scotland, he meant to make his domicile, in the first instance, unconnected with any other circumstance in the case, I should say that the weight of evidence seems rather to be in favour of the Scotch residence over the English residence. But that is not the true point to be decided here. The law upon the subject is to be applied to the facts, which I apprehend to be clear, and to be well laid down in the case to which I have referred in the course of the argument of *Somerville v. Lord Somerville*, decided by Lord Alvanley. The law I take to have clearly established three propositions: the first of them is, that the succession to personal estate is to be regulated by the law of the domicile. The second rule is, that although a man may have two domiciles for other purposes, yet he can have but one domicile for the purpose of the distribution of his effects in a case of testacy or intestacy; and that the burden of proof lies upon the party who alleges that he was domiciled in a particular place. Whether it be a case of testacy or intestacy, it is absolutely necessary that he should be able to do so; for a man can have only one domicile for this purpose. He may have several residences and several domiciles for other purposes, but for the purpose of the distribution of his effects he can only have one domicile. There may be a difficulty in ascertaining his domicile. The question is not simply where he most frequently lived, but you must determine where his domicile was; and according to the domicile the effects are to be distributed.

But in this case it is perfectly clear that another proposition (the third proposition laid down in the case to which I have referred) must be considered, and that proposition is, that every man must be presumed to be domiciled according to the law of his origin and in the place of his origin—that is, the place of his family in the first instance—although, for municipal purposes, he may require another domicile, unless he has abandoned his former domicile *animo et facto*. And the burden of proof in this case is upon the appellant, to show that Mr McClure had *animo et facto* abandoned his former domicile, which he had unquestionably acquired in Wigan. She must prove both of these circumstances—not only that he had intended to change his domicile, but that he had actually changed his domicile. I cannot myself conceive a case in which it could happen that a man might be said to intend to have abandoned his former domicile, unless he had quitted the place where he resided, and ceased to reside there. If he still kept residence in that place with the intention of residing there indefinitely at any time when he chose to reside there, I cannot conceive that in such a case as that (though I do not deny that such a case might happen) he could have abandoned his former domicile and acquired a new domicile. I confess I have difficulty in conceiving that case, although my noble and learned friend on the Woolsack, and my noble and learned friend who last addressed your Lordships, conceived that there might be such a case. But that is not the present case, because here, the burden of proof lying upon the appellant to prove the fact of the change of domicile, she has failed in that proof; she has not made out that the party both intended to quit Wigan, and did actually abandon his former domicile. I consider the simple fact (without going into the other circumstances of the case) of his retaining his house at Wigan, connected with the keeping of an establishment of servants there, is a proof that he had not actually abandoned the domicile which he unquestionably had. On that account, therefore, without entering into the other circumstances of the case, although there are some circumstances rather tending to show that he meant to make his residence in Scotland, I think it is clear that he certainly had not abandoned his English domicile, and therefore was not capable of acquiring a domicile for the purpose of succession in Scotland; for until his English domicile was abandoned both in intention and in fact, he could not acquire a new domicile in Scotland. Upon this ground I think this case must be decided; and, although the Lords of Session considered this a case of some difficulty, I must own that, looking on the simple fact that has to be established and made out, it does not appear to me to be one of much difficulty. The proof which lies upon the appellant has not been made out to my satisfaction; and I think, therefore, that the interlocutor ought to be affirmed.

The Rev. JAMES GRANT, *Appellant*, v. Miss JANE LIVINGSTON, *Respondent*.—  
(May 3, 1860.)

The proceedings in which this appeal originated were of a somewhat complicated character; but the facts, as collected from the arguments, were as follows:—In 1840, a proceeding termed a libel was served upon the late Mr Livingston, then minister of the Presbytery of Hamilton, charging him with the commission of certain ecclesiastical offences; and concluding that he should be deposed from the office of the ministry. The Presbytery of Hamilton pronounced a judgment finding him guilty of certain charges, but did not award any punishment. In May 1841, Mr Livingston presented a note of suspension and interdict to the Court of Session against that judgment, praying them to interdict the respondents therein named from pronouncing any sentence of deposition against him, upon the ground that the Presbytery was not a legally constituted church court, in respect of the presence of ministers of *quoad sacra* parishes not legal members of the Presbytery. That application was granted, and Mr Livingston then instituted an action of reduction against the judgment of the Presbytery, which was dismissed. While these proceedings were pending, the General Assembly pronounced a sentence, deposing Mr Livingston from the



ministry. Mr Livingston obtained an interdict against this sentence, prohibiting its being carried into effect; whereupon the Presbytery of Hamilton and the General Assembly instituted an action for the reduction of the two interdicts, and concluding to have it found that Mr Livingston was lawfully and validly deposed from the office of minister. The Lord Ordinary decided against Mr Livingston, which was affirmed by the Court of Session upon appeal. During all this period Mr Livingston continued to act as minister, but received no stipend; and the result was, that a number of actions of multiplepoinding were instituted by the heritors for the purpose of having declared to whom the stipend belonged. In this position the question arose between the respondent, Miss Jane Livingston, as representing her late father, and the Rev. James Grant, as the collector of the Widows' Fund, as to who was entitled to the unpaid stipends. The 54th Geo. III., c. 169, s. 9, enacted that where any vacant stipend should arise, it should be applied and paid to the general collector of the widows of ministers of Scotland. On an action of multiplepoinding being brought by a Mr Lockhart, praying that it might be declared who was entitled to the stipend during the time the proceedings were pending, the Court of Session decided in favour of the respondent, and against that decision the present appeal was brought.

At the conclusion of the arguments,

The LORD CHANCELLOR, LORD CRANWORTH, and LORD WENSLEYDALE were of opinion that the judgment of the Court below should be affirmed.

Lord CHELMSFORD said he was of a contrary opinion, but he should not disturb their Lordships' judgment by giving his reasons for differing. He should, however, move that the appeal be dismissed, without costs.

Appeal dismissed without costs accordingly.

#### SAME v. SAME.

This was another appeal from the same Court, in which a similar point arose. Their Lordships dismissed the appeal, without costs.

ROBERT HOUSTON, *Appellant*, v. THE LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF GLASGOW, *Respondents*.—(14th May 1860.)

This appeal originated in an action raised by the late Robert Houston, formerly minister of the parish of Gorbals, against the respondents, for the purpose of having it declared that the latter were bound to take over the church, churchyard, etc., of the parish, with all the burdens and liabilities thereto attached, and that they should be directed to pay the pursuer the sum of L.1324, 10s. 5d., as arrears of stipend due to him as minister of the parish. The question was, whether the property came within the Glasgow Municipal Extension Act, the 9th and 10th Victoria, cap. 289, which enacted that the common goods and property heritable and moveable, and means and revenues and income of every description leviable within or belonging to the city of Glasgow, to the barony of Gorbals, to the burgh of Calton, and to the burgh of Anderston, should be vested, subject to their legal liabilities, in the respondents. The Court below decided that the property in question did not come within the meaning of the Act.

At the conclusion of the arguments on behalf of the appellants,

Their Lordships, without calling upon the other side, dismissed the appeal with costs.

Appeal dismissed accordingly.

## English Cases.

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**DAMAGES.—Breach of Promise.**—The existence of a pre-existing promise to marry another than the defendant is no answer to an action for breach of promise. Cockburn, C.J.: It was said that this is a contract *uberrimâ fide*. There is no doubt that there are many things which it is desirable that a man should know when he enters into such a contract, and which, when communicated, might operate on his mind to prevent his entering into the engagement; and yet the non-disclosure of those circumstances would not remove his liability to an action. The only instance in which ignorance of the party contracting excuses performance of the contract, is where a woman has been unchaste. Incontinence goes to the root of all the domestic happiness in contemplation when the contract is made, and is sufficient to absolve from its performance. But there is nothing of that kind disclosed here. The plaintiff is only said to be under a previous engagement to marry another man. That affords no impediment to her marriage with the defendant. It casts no imputation on her virtue, and does not therefore come within the principle upon which, in practice, misconduct of the woman is allowed to be an answer.—(*Beachey v. Brown*, 8 W. R. 292.)

**ASSURANCE.—Misrepresentation.**—A policy of insurance, effected by A. on his own life, was subject to a condition that it was to be void in case any untrue statement was contained in any document deposited with the insurance company in relation to the insurance by the assured. Certain documents were so deposited with the company, containing, among other matters, the questions following, to which the assured had given the answers following:—Q. "Whether assured had since infancy any disease requiring confinement?"—A. "No." Q. "How often had medical attendance been required?"—A. "One year ago." Q. "For what disease?"—A. "A disordered stomach." Q. "For what period confined to bed or house?"—A. "A week." Q. "Name and address of medical attendant employed on occasion of such disease?"—A. "Dr B." In fact, the assured had had, subsequently to the disease attended by Dr B., another and a dangerous illness, for which three other medical men had attended him. *Held*, by the Ex. C., affirming judgment of the Common Pleas, that the above answers were untrue, and the policy void. Pollock, C.B.: The question for the Court is simply whether or not the statements of the assured were in effect untrue; and we are all of opinion that the answers were not true. It is said that the answers were true as containing part of the truth, as in cases where in a statement of the age of a party he has said he was of such an age, when in reality he was of that age and something more. In this sense the answers may be true, but something more is wanted to make them really true.—(*Cazenove v. British Equitable Assurance Company*, 8 W. R. 243.)

**SUCCESSION.—Bonus on Shares.**—B. having shares in a company, bequeathed them to C. for life, and died between the time of the declaration of a bonus upon them and the time appointed for its payment. This bonus was held not to go to C., but to form part of the testator's general estate. It was left undecided whether, if the bonus had been declared after B.'s death, it would have passed to C., who had only a life-interest in the shares.—(*Loch v. Tenables*, 35 L. T. Rep. 506.)

**WILL.—Revocation.**—Several sheets of paper constituting a connected, but not in all points consistent, disposal of property were found together, the last

sheet being duly executed.—*Held*—That the presumption, in the absence of proof, will be that they all formed the will of the testator at the time of the execution, although a general clause revoking "all former wills" might lead to the inference that testator contemplated at the time to leave a subsisting will. In the same case it was also held that the annexation by a piece of tape of a duly executed codicil of later date to testamentary papers, duly executed but revoked, does not of itself lead to the inference of an intention to revive, and that such intention can only be shown by the contents of the codicil itself.—(*Marsh v. Marsh*, 35 L. T. Rep. 523.)

**CONTRACT.—Damages.**—B. told C. that Admiralty contracts were out for coals, and inquired if he had any tonnage to offer. In consequence, B. chartered a ship of C., which was not ready in time to enable B. to fulfil his Admiralty contract. B. thereupon arranged with another vessel to take his coals in pursuance of the contract, and the jury found that this was best for the interests of all concerned. B. was held to be entitled to recover, as damages for the breach, the extra expenses incurred by so forwarding the coals.—(*Prior v. Wilson*, 35 L. T. Rep. 549.)

**PARTNERSHIP.—Bill of Exchange.**—An arrangement was made between the defendants, merchants in London, and V. and Co., merchants in Buenos Ayres, that V. and Co. should draw upon the defendants, and sell these drafts, and, when an opportunity offered, purchase others, to be remitted to the plaintiffs for the purpose of covering their acceptances. The profits on these transactions were expected to arise from the difference in the rates of exchange, and it was agreed that they, or the losses, if any, should be divided equally between the two firms. Bills were accordingly drawn by V. and Co. upon the defendants, and sold to the plaintiffs, who were informed of the authority given by the defendants to V. and Co. to draw the bills. These bills were signed by V. and Co. in their own names. *Held*, in an action against the defendants, as drawers of the bills, that, though there was a partnership between V. and Co. and the defendants, they were not liable, V. and Co. having no authority to bind them by their signature in their own names; that the defendants were not liable for the amount of the bills in an action for money had and received as upon a failure of consideration; and, that the defendants were not liable for not accepting the bills, as they had not, under the above circumstances, contracted to do so. Cockburn, C.J.: Without trenching on the doctrine that a partnership would be constituted under these circumstances, or upon the doctrine that a dormant partner is liable, as drawer, upon bills drawn in the name of the firm for partnership purposes, I base my judgment on this, that there was here no authority, express or implied, given to V. and Co., to bind the defendants by their signature to bills of exchange. In the ordinary case of mercantile partnerships there is no need of any express authority, because it is implied by the law, being an ordinary incident of such a partnership. Here, however, there is no express authority, the arrangement being, on the contrary, that V. and Co. were to draw on the defendants, obviously on their own account and not as agents of the alleged partnership; neither is there any implied authority, or any authority conferred by operation of law. The existence of the partnership was unknown; the purposes of it were unknown; and there was, therefore, nothing to which the principle of law could attach that, where a partnership is held out as existing for a particular purpose to which the drawing of bills by the partners would be incidental, all the members, whether dormant or not, would be liable upon bills so drawn.—(*Nicholson v. Rickells*, 8 W. R. 211.)

**PARTNERSHIP.—Contributory.**—The Court of Appeal has reversed the decision of Kindersley, V.-C., reported 1 L. T. Rep. N. S. 202, where it appeared that the widow of a shareholder became his administratrix, and as such sold some of the shares to purchasers, and caused the remainder to be transferred to her own name, but without a formal compliance with the deed of settlement of the

company, and without herself executing the deed. She paid a call and received dividends. She married, and on marriage assigned the shares upon trust for her separate use for life, with remainder to the children of her first husband. The trustees repudiated the trusts, never acted, and no other trustees were appointed. The company had no notice of the marriage. Afterwards, using her second husband's name, she gave a written order for payment of dividends to his account with his bankers, and he received the dividends under that order until the bank stopped payment. The shares, however, remained in the wife's name. On the company being wound up, the names of husband and wife were placed on the list of contributories. The V.-C. held that the husband was not liable, and directed the insertion of the wife's name "in respect of her separate estate." But the Court of Appeal now held both husband and wife to be liable, and the above restrictive words to be taken out of the order, for that the Joint-Stock Companies Acts have in no way altered the common law liability of a husband for the obligations of his wife previously to the coverture.—(*Ex parte Lward*, 36 L. T. Rep. 3.)

**SETTLEMENT.—Power of Advancement.**—In *Lloyd v. Cocker*, 36 L. T. Rep. 9, a power in a settlement to raise money for the placing out of children in a profession, business, etc., "or for their advancement in life," was held to authorize in the case of daughters the raising of a marriage portion. The M.R. said:—This is a very ill-drawn instrument. I am unable to understand what is meant by "advancement," unless the word can be extended to a daughter's marriage; she can be put to no profession or business, and there is no other way in which she can become entitled to this fund. It is clear, from the context, that by introducing the words "advancement in life," there is something meant additional "to trade or business," and that these words are used disjunctively. I will, therefore, answer this question by saying that the father has the power to advance this money.

**WILL.—Construction.**—In *Ashton v. Horsfield*, the testator, without expressly giving his personal estate or the interest thereof to any one, directed his trustees "to retain what portion of the capital they thought fit to carry on his cotton manufactory, and pay the profits and surplus income" thereof annually to his daughters. This was held by the House of Lords (affirming Lord Chancellor's decree) to be an implied absolute gift of the capital and income not so applied to the carrying on of the business. It was also held that, under a gift over of "all my real and personal estate situate in W. and H.," might be included the capital employed in the business which was carried on at those places.

**ARBITRATION.—Costs.**—An action commenced, and all disputes and differences between the parties arising out of the same subject-matter, were referred to arbitration, the costs of and incident to the reference and award, including the costs of the action, to abide the event of the arbitration. The umpire awarded some matters in dispute in favour of one, and others in favour of the other. The costs were held not to be distributable, for, as neither party had succeeded, there had been no general event of the award in favour of either entitling him to costs. But Cockburn, C.J., intimated that if matters, substantively separate and distinct, are referred, with costs, to abide the event, and some of these distinct matters are found for one and others for the other, the costs would be distributable.—(*Marsack v. Webber*, 36 L. T. Rep. 54.)

**CHARITY.—Superstitious Use.**—In *Re Michel's Trust*, 36 L. T. Rep. 46, a bequest of L.10 per annum to the wardens of a Jewish congregation in Little Poland, to be paid by them to three qualified persons chosen by them to learn in their college daily, for ever; and on every anniversary of his (testator's) death, to say the prayer called Cawdish, was held not to be a superstitious use, and by the retrospective operation of stat. 9 and 10 Vict., c. 59, to be a good charitable bequest.

**LEGACY.—Set-off.**—B. directed that his debts should be paid out of his real estate. He bequeathed all his personal estate to C., free from his debts. The tenants of the real estate owed to B. at the time of his death various balances made up of demands they had against B. in his lifetime for goods sold, etc., as deductions from their rents. It was held that C. was entitled only to the balances, and not to total amount of rents. Wood, V.-C., said that when the testator gave his personal estate free from debts, he meant such estate as his executors could have got in by ordinary proceedings. Although, as had been ingeniously suggested, the executors might have forborne to set off the cross demand for rent in an action against them by the tenant for the goods supplied to the testator, that would not have been the ordinary course, and the possibility of its being taken could not be allowed to affect the rights of the parties. The course of dealing of the testator appeared to have been to set off the demands, but his Honour preferred to rest the case on the general principle which he had stated, and must hold that the difference only between the demands was that which passed by the bequest.—(*Ekins v. Morris*, 8 W. R. 301.)

**INSPECTION OF A MINE.**—Where the owner of a mine made out a *prima facie* case that the owner of an adjoining mine was encroaching on him, although contradicted by the other, the Court granted an inspection of such adjoining mine, for the purpose of ascertaining if the fact was so. Cases cited: *Attorney-General v. Chambers*, 12 Beav. 159; *Lonsdale v. Curwen*, 5 Bligh, 163; *Walker v. Fletcher*, 3 Bligh, 172, n.; *Parrott v. Palmer*, 3 M. and K. 632; *East India Company v. Kynaston*, 3 Bligh, 153; and 3 Swan, 248.—(*Bennit v. Whitehouse*, 8 W. R. 251.)

**MORTMAIN.**—The B. ironworks were established by a company, and the deed vesting the property in the trustees empowered the directors to purchase or lease other lands for the benefit of the company, and sell lands not for the time being considered necessary for carrying on the business of the company. Large purchases of land were made, and an annual rental received from them; a profit was also derived from a brewery and farm worked by the company. It was held that a bequest of shares in the company to a charity was void, as being in mortmain, the principal object of the company being to deal in land.—(*Morris v. Glunn*, 36 L. T. Rep. 78.)

**LEGACY.—Construction.**—B. bequeathed to his foreman C. the goodwill of his business in D., "and also the plant and L.1000 sterling for his use and benefit." B. had been a wholesale clothier in London, and at the time of his death possessed stock-in-trade of clothes, etc., and household furniture. The word "plant" was held *not* to embrace such materials.—(*Blake v. Shaw*, 36 L. T. Rep. 84.)

**CONTRIBUTORY.—Acceptance of Shares.**—B., a member of a firm, applied on behalf of his firm for shares in a company, expressing at the same time a hope that they should receive the orders of the company for their manufactures. To this the manager of the company replied that B. might send in his application for shares, "subject to your supplying the various materials which may be required for our purposes." Soon after, B. sent the form of application for 100 shares, with a memorandum at the foot of it, of the above condition. A minute was afterwards recorded by the board, that, if quality and price were approved, B.'s firm should be "dealt with by the board." B. wrote, objecting to this as vague; and although the board entered B.'s name on the register of shareholders, they never called upon him to sign the articles of association, or to pay a deposit. This was held by the Court of Appeal to be only a conditional acceptance of shares, and that B. was not a contributory.—(*Wood's case*, 36 L. T. Rep. 68.)

**DEBTOR AND CREDITOR.—Discharge of Executor's Debt.**—B. owed C. L.4500. C. appointed B. her executor, and by a codicil declared the appointment should not have the effect of cancelling the debt. In 1854 C. executed another codicil, by which she appointed another person executor in the room of B., but confirmed the rest of the will. By a subsequent codicil she reappointed B. sole executor. In 1855 she wrote to B. thus: "You must know when I gave you the money, I never could intend it as a loan, but as an absolute gift, and I hope you will live many years to enjoy it." The defendant also relied upon conversation. Held that the letter did not amount to a discharge of the debt. The following cases were cited: *Richards v. Syme*, 2 Eq. Ca. Ab. 617; *Eden v. Smyth*, 5 Ves. 341; *Reeves v. Brymer*, 6 Ves. 516; *Flower v. Marten*, 2 My. and Cr. 459; *Aston v. Pye*, 5 Ves. 350 n.; *Gilbert v. Wetherell*, 2 Sim and Stu. 254; *Cross v. Sprigg*, 6 Hare, 552; *Peace v. Hains*, 11 Hare, 151; *Major v. Major*, 1 Drew, 165. Wood, V.-C., in commenting on the authorities, said: In *Aston v. Pye* it seems to have been held that a document stating that it was never intended to enforce payment, unless the creditor was in distress, could be acted upon as a discharge. If so, that was certainly quite at variance with *Reeves v. Brymer*, which was commented upon by V.-C. Wigram in *Cross v. Sprigg*, and relied upon as an important case. Sir William Grant, in *Reeves v. Brymer*, after stating the evidence of the party sought to be discharged, said that he regretted to be obliged to hold that the debt was not discharged, and went on: "It is said there is evidence of a release from what passed between them, etc. All that is nothing more than a declaration by the testator that he would never sue for this money, which certainly is not sufficient to operate as a release." That is the point frequently referred to afterwards, viz., that declarations by persons that they never intend to sue for the money, will not operate as a release, the question being, in *Aston v. Pye*, and also in *Gilbert v. Wetherell*, as to how far any positive declarations which a creditor has actually made, as distinct from intention, may or may not amount to a discharge at law. Then, as to how far any positive declaration by the creditor might amount to a discharge at law, he agreed that it would be excessively dangerous to allow the debtor to discharge himself upon a mere parole declaration by the creditor. But the defendant relied upon the letter of January 1855, by the testatrix. The letter of January 1855 was written on the spur of the moment, after a conversation, in which some one had been said to have been busy with her affairs. He did not suggest a single suspicion of impropriety against the defendant; but the letter was in truth a misrepresentation of the actual transaction. Whenever her legal adviser was with her she represented the matter as a loan. Nor was there any indication of an intention to release the debt, but a misstatement of its original inception.—(*Knapp v. Burnaby*, 8 W. R. 305.)

**INDICTMENT.—New Trial.**—The doctrine of *finality* upon a verdict of acquittal in a criminal proceeding received another illustration in the recent case of *Reg. v. Johnson*, 1 L. T. Rep. N.S. 513, which was an indictment for obstructing a highway. The record of the indictment being in the Q.B., and the defendant having been acquitted at the trial, a rule *nisi* was obtained by the prosecutors for a new trial, upon the ground of the verdict being against evidence. Upon cause being shown, the Court discharged the rule. Wightman, J., thus lays down the proper doctrine upon the subject. He says: "At the trial there was conflicting evidence, and the jury have found a verdict of acquittal contrary to what we may think right. The question is, ought we now on that ground to grant a new trial? It is said that this proceeding, though in form a criminal one, is really instituted to try a civil right. But is that so? It does not bind the right; and, besides, the defendant, on conviction, is liable to be treated as a criminal, and to be subjected to fine and imprisonment. On the whole, I think it better to abide by the rule, where so much of the criminal law is incidental to the case, not to grant a new trial on the ground that the verdict is against the evidence, after the defendant has been acquitted."

**EXECUTOR.—Probate.**—An executor is appointed in a duly executed will, and the testator, having expressed his intention of so doing, obliterates the original name and substitutes another without re-execution; the Court of Probate directed the original name to be restored in the probate, on evidence *abunde* of what it was.—(*Re Harris*, 2 L. T. Rep. N.S. 118.)

**REAL AND PERSONAL.—Railway Debenture.**—The debenture bond of a railway company in the form prescribed by the Companies Clauses Act (see Taylor's Consolidation Acts, 3d edit.) is a valid mortgage, not only of the interest of the company in their works and rails, but of the land of the company.—(*Legg v. Mathieson*, 36 L. T. Rep. 112.)

**CONTRACT.—Misrepresentation by Third Party.**—B., representing that he was entitled to a lease of certain houses from the landlord at a peppercorn rent, applied to D. to lend him L.300 on them, which he agreed to do, provided an assurance could be obtained from the landlord that he would grant the lease at that nominal rent. The owner wrote, saying that he would, and on January 19, 1857, he executed a lease to B. accordingly. On May 2, in the same year, D. advanced the L.300 to B., receiving from him a deed purporting to be a mortgage of the underlease. B. afterwards became insolvent, and then it was discovered that the landlord had, in 1856, granted to him a lease for ninety-nine years, which included these leaseholds. The Court of Appeal held the landlord liable to make good the loss occasioned by his misrepresentation. Lord Chancellor (the Lords Justices concurring): The defence set up in this suit is, that there was a remedy at law, and that that is the only remedy competent to the plaintiff. Now, that there was a remedy at law, I think is quite clear. Here was a misrepresentation made by the defendant of a fact which ought to have been within his knowledge; it was made with the intention to be acted upon; it was acted upon, and thereby a loss accrued to the plaintiff, and there is no doubt in my opinion that an action would lie, and it would be for a jury to assess the damages. I am of opinion that this belongs to a class of cases where courts of law and courts of equity have a common jurisdiction, and where the procedure of courts of law and courts of equity is adapted to doing justice in these cases. I am of opinion that this is a case in which a court of equity has jurisdiction as well as a court of law, and that it is a much fitter case for a court of equity than for a court of law; because a court of law could only have left it to a jury to assess the damages; whereas here, by the superior powers of the court of equity, justice can be done between the parties in the most minute details. Here there has been a misrepresentation in the transaction of letting the land; and I am of opinion that this is a case in which, if there had been moral fraud, it would hardly have been doubted that a court of equity would have jurisdiction to inquire into it, and to have called upon the defendant to have disclosed all that he knew, and have given relief from the consequences of the fraud; and although there may not be moral fraud here, yet I think that the party who has been injured has a right to relief.—(*Slim v. Croucher*, 8 W. R. 233.)

**RAILWAY.—Compensation.**—Where a railway company gave notice to take part of a garden and orchard attached to a dwelling-house, the effect of which would be to cut off the communication between the house and the stables, the company was held to be bound to take the entire premises.—(*King v. The Wycumbe Railway Company*, 36 L. T. Rep. 107.)

**WILL.—Construction.**—B., after bequeathing "all his stock and money in the funds," together with his residuary personal estate, to trustees to pay debts, directed that they should convert into cash all his residuary estate and effects, "except the freehold, copyhold, leaseholds, and stocks." He possessed two sums of long annuities. They were held to be within the exception, and not to be converted into cash. Wood, V.-C., said that on principle he was of opinion that the long annuities were excepted from the direction to convert. The words "stock and money in the funds" would, in their primary meaning, pass long

annuities. In *Bythewood and Jarman's Conveyancing*, vol. ii., pp. 453, 457, there was an enumeration of the various British funds. In the exception, the testator made no distinction between "stocks" and "money in the funds," and he clearly intended the same thing which he had before described by those words, which were amply sufficient to pass the property in question. Looking at what was excepted, the testator meant to except everything of a perishable or terminable character which was to be excepted from the direction to convert and left unsold. Then the subsequent words, "rents, dividends, etc.," were quite sufficient to include the annual proceeds of long annuities.—(*Grant v. Musset*, 8 W. R. 330).

**MARITIME.—Ranking.**—It was held in the "*Hendrica Gazina*," 2 L. T. Rep. N.S. 139, that the master and seamen are entitled to be paid their wages in priority to a bottomry bondholder, who takes his security subject to the ancient and hitherto unbroken rule of the Court of Admiralty, which makes the claim for wages the first charge upon the ship's freight.

—**Contract.**—A contract or ship's articles signed by seamen when originally undertaking the voyage, must regulate the payments to be made to them on its termination; and a claim for increased wages was disallowed in the "*Prince Edward*."—(2 L. T. Rep. N.S. 139.)

**CONTRACT.—Approval.**—The proper construction of an agreement to make a machine "for cutting glue pieces according to drawing, strong and sound workmanship, to the approval of B.," is, that the approval of B. is to be as to the strength and workmanship of the machine, not as to its efficiency for cutting glue pieces.—(*Ripley v. Lordan*, 2 L. T. Rep. N.S. 154.)

**PRACTICE.—Costs of Counsel.**—The Court of Appeal in Chancery allowed the costs of three counsel as between party and party, in a case where there had been an appeal, and the quantity of matter put before them on appeal was double that which had engaged the two counsel in the court below.—(*Pearce v. Lindsay*, 2 L. T. Rep. N.S. 169.)

**TRUST.—Investment.**—This was an application under Lord St Leonards' Act for the "opinion, direction, and advice" of the Court, with reference to the investment of trust funds. The testatrix had directed the proceeds of her estate to be invested by her trustees in "the public stocks and funds, or upon Government or other approved securities." It was held that they could not invest in East India stock or railway debentures, but that they might do so in freehold estates in England or Wales. Wood, V.-C., said that *prima facie* the words of the will would include any such ordinary security (not merely the Three per Centa.) as this Court would sanction. He did not go beyond mortgages in the case of marriage settlements, and he never authorized investments upon railways or any such securities, unless most strongly pressed to do so by the parties. If acting himself as trustee, which was what it came to in effect, he should only allow real securities. He had no objection to answer that the petitioners were at liberty to invest the trust funds on sufficient security of freehold estates in England or Wales. He should not answer the other part of the question, but simply pass it by. The costs of the petitioners might be taken out of the estate.—(*Re Simpson's Trust*, 8 W. R. 388.)

**PROBATE.—Evidence.**—A testator wrote on a sealed envelop, "I confirm the contents written in the enclosed document in the presence of," etc. This was signed by her, and attested by two witnesses. On her death, it was found sealed on her table, addressed to B., her nephew. On being opened, it was found to contain a testamentary disposition in the form of a letter addressed to her nephew. The Court admitted parole evidence of the identity of this enclosure with the document referred to by the executed memorandum, and granted probate of the envelop and contents.—(*Re Almomino*, 2 L. T. Rep. N.S. 191.)



**MARITIME.—Freight.**—An assignment to a third party of freight, or a fixed sum out of freight, passes, as between part owners, only net freight. But a mortgagee not in possession when the freight was received, has afterwards no *locus standi* to insist on such a construction.—(*The Edmond*, 2 L. T. Rep. N.S. 192.)

**CONSTRUCTION OF A CONTRACT.—Warranty.**—B. sold to C. a cargo of wheat, which C. could not examine, but the contract note set forth that "the cargo is accepted on the report and samples of Messrs S. and Co." This was held to amount to a warranty that the bulk of the cargo was equal to the report of Messrs S. and Co., and the samples taken by them, and not a mere warranty that the report was a report by them, and that the samples were taken by them. Argument in demurrer:—The plaintiff's points on the argument of the demurrer will be, first, that the language of the contract in itself amounts to a warranty by the defendants that the cargo was equal to the report and the samples; secondly, that even supposing that such is not the proper construction of the contract taken by itself, yet when the state of things existing at the time of the contract as disclosed on the declaration is looked at, it is apparent that such is the true construction. The defendants' points will be, that the words in the agreement, "the above cargo is accepted on the report and samples of Messrs Scott and Co. of Queenstown," do not amount to a warranty that the bulk was equal to the samples, or that the report was correct; but merely to a warranty that the report was the report of Scott and Co., and that the samples had been taken from the cargo by them. Erle, C. J.: I am of opinion that the plaintiffs are entitled to judgment on this demurrer. We must construe the contract according to the intention of the parties. Here was a contract for the sale of a cargo of wheat; and the words of the contract were, that the plaintiffs "accepted the cargo on the report and samples of Messrs Scott and Co." This must mean that the wheat was accepted on the supposition that the wheat was equal to the sample and the report; not that the warranty was simply that the report and samples had been made and taken by Messrs Scott and Co.—(*Russell v. Necolopulo*. 8 W. R. 415.)

**MERCANTILE LAW AMENDMENT ACT.**—Sect. 5 of this Act enacts, that a surety for the debt of another, if he pay such debt, shall be entitled to have assigned to him "every judgment, specialty, or other security which shall be held by the creditor in respect of such debt, whether such judgment, etc., shall or shall not be deemed at law to have been satisfied by the payment of the debt, etc., and such surety shall be entitled to stand in the place of the creditors, with all the same remedies for the recovery of the money thereby secured. It was, however, held in *Phillips v. Dickson*, 2 L. T. Rep. N.S. 185, that under this section the court cannot, upon motion by a surety who had paid the debt of his principal, order the assignment of a security held by such principal. The right course of proceeding was not stated.

**EVIDENCE.—Documentary.**—In an action of ejectment, the principal fact in dispute was, whether plaintiff had been born before or after the marriage of his parents. His mother was called as a witness, and, on cross-examination, stated that she had never been before the magistrates in the matter, and had never affiliated the child. The defendant tendered, in contradiction of her, an affiliation order, signed by two magistrates, made on her oath, adjudging the child to be chargeable as a bastard. This document was held to be admissible for that purpose. Wilde, B.: "I think that the document was evidence to show that on the day named a person of the name therein set out did appear before the justices and affiliate a child. Of course the jury must be satisfied from other evidence of the identity of that party with the witness."—(*Watson v. Little*, 2 L. T. Rep. N.S. 223.)

**TRUST.—Liability.**—Defendant gave plaintiff a promissory note, heading it with the name of a building society, and adding after his name thereto sub-

scribed "trustee." In an action on this note, he pleaded that it was made by a certain building society whereof he was a member with others; that it was not made by him otherwise than as such member; and that divers persons were trustees, and liable, by virtue of Acts of Parliament in that behalf, to be sued as such upon the contracts of the society. Upon demurrer this was held to be a bad plea. Pollock, C.B.: The defendant does not deny the form of the contract, as stated in the declaration, but contends that it does not render him personally liable. I think it does, and that it is not competent for him by a plea to say that a written document means something different from what it purports. . . . He has given his own promissory note for the money borrowed, and it appears to me he is personally liable upon it.—(*Price v. Taylor*, 2 L. T. Rep. N.S. 221.)

**SALE BY AUCTION.**—By order of the Court, property was put up for sale by auction. There being no bid up to the reserved price, it was knocked down as unsold. Before the auctioneer had left the desk, B. agreed to purchase the lot at the reserved price, signed a contract, and paid the deposit. He was held to be estopped from afterwards disputing the sale, as not being a sale by auction, nor was he permitted to repudiate the purchase.—(*Else v. Barnard*, 2 L. T. Rep. N.S. 203.)

**CONTRACT.**—*Condition Precedent.*—B. covenanted with B. and C. well and sufficiently to light with gas certain streets, etc., to the satisfaction of C. and his surveyor, at sunset, and to continue the lamps burning until sunrise, at the rate of L.4. 10s. for each light, the burner to be a bateswing, and that in case and as often as any neglect should occur, he would remedy the same, or pay to C. 2s. 6d. for every day on which such neglect should continue. And C. covenanted, that if B. did well and sufficiently light the said lamps with gas, and perform and keep all the covenants, he would pay for every lamp at the rate of L.4. 10s. per annum. To an action by B. to recover a large quantity of gas supplied to C., it was pleaded that B. did not light the said lamps to the satisfaction of C. or his surveyor, and did not light them at sunset and continue burning them till sunrise, and that the light was not a bateswing burner. But the Court held the covenants to be several and independent, and that the performance of all the matters set forth in the pleas was not a condition precedent to the right of B. to recover on C.'s covenants. "I think," said Erle, C. J., "the plaintiffs' covenant to light the lamps is a several covenant, and the defendants' promise to pay is a several promise. Even if the plaintiffs left one lamp unlighted throughout the year, it would, I think, be contrary to the intention of the parties, that the plaintiffs simply from that circumstance should be defeated and deprived of the right to recover from the defendants for lighting the remainder of the lamps." Willes, J., observed, "the plea would be proved as it stands, by simply showing that one lamp blown out by the wind remained unlit for half an hour."—(*London Gaslight Company v. The Parish of Chelsea*, 2 L. T. Rep. N.S. 217.)

**BILL OF EXCHANGE.**—*Partners.*—B. carried on business at C. Street in D., on his own account. He opened another establishment in a different line at E. in partnership with F. The business was in B.'s name. F. accepted bills in his own name for goods supplied to the firm. One bill so accepted was directed to B. at C. Street, in D. It was held by a majority of the court, that the fact of the bill being addressed to B.'s separate place of business was not sufficient to rebut the presumption arising from the evidence of F.'s general authority to accept.—(*Stephens v. Reynolds*, 2 L. T. Rep. N.S. 222.)

**LIABILITIES OF A LODGING-HOUSE KEEPER.**—The C. P. have decided, that there is no duty in the keeper of a lodging-house to protect the goods of his lodger, and that he is not liable for their loss, even although it was occasioned by his showing the lodger's apartments, with the lodger's permission, to

strangers, himself not being guilty of gross misconduct or wilful negligence. Erle, C. J., thus stated the distinction between the case of a lodging-house keeper and that of an innkeeper. The reason of the law making an innkeeper liable is, that a wayfarer, who may be a complete stranger in the neighbourhood, has no means of knowing the character of those with whom he may be brought into contact at the inn, and therefore the law imposes on the innkeeper the obligation of protecting the goods of his guest. But this reason for the law has no applicability to the case of a lodging-house keeper. It is not contended that there is an absolute duty cast upon the keeper of a lodging-house to protect the lodger's goods; but the allegation is, that he did not take such due and proper care of his house as a prudent man would take, by means whereof certain dishonest persons were admitted into the house and stole plaintiff's goods. I am most averse to affirm the proposition, that the lodging-house keeper is bound to take due and proper care of his lodger's goods, as the greatest mischief might be done by imposing on him undefined duties, the result of which no man can foresee. Looking at the character of the different persons taking up their abode at lodging-houses or frequenting them, if the landlords of such houses were to be held liable to them under such circumstances, it would to my mind be affirming a pernicious evil. The risk at lodging-houses must vary according to circumstances. Near the seaside it would be most inconvenient and objectionable that the door should be kept locked all day; so also in a port where the lodgings are taken at short notice, and the lodgers continually moving in and out. The lodger staying in such houses must take care of his goods in like manner as of valuables upon his person when he walks the streets.—(*Houlder v. Soulby*, 2 L. T. Rep. N.S. 219.)

**MARITIME LAW.—Bottomry.**—A master of a ship on his own authority can bottomry the vessel abroad for the homeward voyage to the extent of necessary repairs and articles actually supplied to the ship. But he cannot include charges relating to the outward cargo, even though they constitute debts due from the owner of the ship, unless by the law of the port the ship can be arrested for them.—(*The Edmond*, 2 L. T. Rep. N.S. 192.)

**RES JUDICATA.—Master and Servant.**—Mary Hislop had been hired as a farm servant, by one William Routledge, in August 1858, to serve him till the then next Martinmas, at L.5 wages, but that he discharged her on the 7th of the following September; that upon this she sued him in the County Court, the particulars of her claim being, “L.6, 6s. 6d. for damages for the breach by the defendant of a contract of hiring made between him and the plaintiff, on the 1st August 1858, by discharging the plaintiff from the defendant's service before the determination of the said contract, without reasonable cause.” Upon the trial the judge, after hearing witnesses on both sides, gave judgment for the plaintiff. Some time after this she took out a summons under the Master and Servants Acts against the same party, which recited that “information and complaint had been made upon oath, for that you, William Routledge, at Lamas last past, hired or employed one Mary Hislop to be your servant in husbandry from Lamas last past till Martinmas last past, for the wages of L.5. That she entered upon the said service, and stayed till the 7th September 1858, when she was discharged from the said service without just cause, but that she was always ready to complete her service, and that you refused to pay her the wages justly due from the time she was hired, amounting to L.5. When the matter came on for hearing before the justices, it was contended for the defendant, that they had no jurisdiction to hear and adjudicate, inasmuch as the same question between the same parties had already been decided by the County Court. On the other hand, it was contended, that as the complainant had additional evidence to show that she was improperly discharged, and that the damages in the plaint were for breaking open a box, as well as for an improper discharge, the justices had jurisdiction. The justices thought their jurisdic-

tion was not ousted, and having heard the complaint, they made an order in favour of the complainant. But upon the question coming before the Q. B. upon a case, stated, that under the 20 and 21 Vict., c. 43, the Court held the justices were wrong, the former decision by the County Court being conclusive and binding upon the point. The ruling authority cited upon the argument was that of the *Duchess of Kingston's case*, 2 Smith's Leading Cases, 424, which conclusively establishes the proposition, "that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court." In giving judgment, Cockburn, C. J., says, in reference to the foregoing proposition, "Applying that rule to the present case, it was open to the justices to inquire whether the County Court had jurisdiction, and whether the judge had determined that the discharge of the respondent was rightful, and not without due cause; but as soon as they had ascertained both those facts in the affirmative, they were bound by law not to allow the dispute as to the discharge being wrongful to be re-opened, and to treat the decision of the County Court as conclusive between the parties;" and, subsequently, he remarks, that, "varying the form of the claim where the claim itself is the same, does not prevent the application of the rule of law to which reference has been made."—(*Routledge v. Hislop*, 2 L. T. Rep. N.S. 53.)

PROBATE.—*Personality in Scotland*—21 and 22 Vict., c. 56, s. 14.—On the 17th of April 1860, probate of the will of Charles Faulkner (deceased), who had died domiciled in England, was granted in the principal registry of the Court of Probate, to the executors named therein. The property of the deceased was sworn under L.16,000, and probate duty (L.250) had been paid thereon. Of this sum L.14,130 was invested in stock in the Edinburgh and Glasgow Railway Company. A few days after the grant had passed, an application was made at the registry to have the proper note or memorandum indorsed on the probate, that the deceased had died domiciled in England, under sect. 14 of 21 and 22 Vict., c. 26 (the Confirmation and Probate Act). The registry had refused this application. The petitioner moved the court for an order to withdraw or rescind the probate which had been granted, and to allow a new grant to be made. This grant had been obtained under the apprehension that the memorandum might be indorsed after the grant had issued. The court had, however, decided, *In the goods of James Muir*, 1 Swab. and Trist. 294, that the memorandum should be indorsed upon the probate upon its issuing, and it had refused to revoke that grant, saying, "that a probate rightly granted, and *not taken out under any mistake*, could not be revoked." Here the grant had been taken out under mistake. The object of the motion was, to save paying the duty on the property in Scotland twice over.

Sir C. CRESSWELL.—I must adhere to some definite rule. I cannot draw any distinction between this case and the case cited, *In the goods of James Muir*. If you have made a mistake in the matter, the Stamp Office may be able to rectify it.

(*In the goods of Charles Faulkner*, 8 W. R. 454.)

PRACTICE IN RESPECT OF CERTIFICATES FOR THE IRISH PROBATE COURT IN 20 and 21 Vict., c. 79, s. 94; 22 and 23 Vict., c. 31, s. 25.—J. M. Potts, of Old Oak Villa, Shepherd's Bush, in the county of Middlesex, died on 23d February 1860. He left a will in which no executor was appointed, but of which Elizabeth Rattey, spinster, and a minor, was the residuary legatee. Her mother renounced the guardianship, and the minor had elected William Mortimer as her curator, or guardian. He took administration with the will annexed on the 20th of March, and swore the property under L.2000 in England, and gave the usual bond in a penalty of double that amount. There was also property in Ireland under the value of L.60,000.

By 20 and 21 Vict., c. 79 (Probates and Letters of Administration, Ireland), s. 94, it is enacted, that "from and after the period at which this Act shall

come into operation, when any probate or letters of administration, to be granted by the Court of Probate in England, shall be produced to, and a copy thereof deposited with the registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last mentioned Court, and being duly stamped, shall be of like force and effect, and have the same operation in Ireland, as if it had been originally granted by the Court of Probate in Ireland."

By the 22 and 23 Vict., c. 31, s. 25, it is enacted, that "letters of administration granted by the Court of Probate in England shall not be resealed under Sect. 94 of 20 and 21 Vict., c. 79, until a certificate has been filed under the hand of a registrar of the Court of Probate in England, that a bond has been given to the judge of the Court of Probate in England, in a sum sufficient to cover the property in Ireland, as well as in England, in respect of which such administration is required to be resealed."

In consequence of a difficulty felt in the registry as to the proper course to be adopted under these enactments, in respect to the circumstances of the above case, the petitioner moved the court to order that, upon an additional bond being given into the registry either for double the amount of the English and Irish property, or of the Irish property alone, as the court might think fit, one of the registrars do issue a certificate, pursuant to 22 and 23 Vict., c. 31, s. 25, and that a note of further security given be made upon the grant; but that the grant be not otherwise altered, and that no *ad valorem* fees be charged in respect of the amount of Irish property. He submitted that an additional bond to cover the property in Ireland was admissible, in which case the *ad valorem* fees to be taken in the registry would not, he apprehended, be due on the amount under which the Irish property was sworn. Such fees would certainly be due in Ireland, and the property ought not to have to pay them twice.

Ordered, That on bond being given by the said W. Mortimer, with his sureties in the penal sum of L.120,000, for the faithful administration of the personal estate and effects of the said John Morney Potts, deceased, it be noted on the letters of administration already granted to the said W. Mortimer, that the personal estate in Ireland, of the said deceased, had since been sworn under L.60,000, and security given accordingly, and that a certificate do issue under the hand of one of the registrars of the registry of the court that bond has been given to the judge of the Court of Probate, in England, in a sum sufficient in amount to cover the property in Ireland, as well as in England.

(*In the goods of John Morney, Potts*, 8 W. R. 454.)

**JURY TRIAL.—Duty of Judge to Receive Verdict.**—The plaintiff brought an action in the County Court to recover L.6, 10s. for wine supplied. At the trial he was non-suited; but at the next Court, having brought a fresh action, he obtained a verdict. A new trial was granted, and the jury were discharged without being able to agree upon a verdict. The action was tried a fourth time, when the jury returned their verdict as follows:—"In the absence of any order in writing for the wine, we find a verdict for the plaintiff." The judge refused to receive the verdict, and ordered the jury to retire and reconsider it. They said they had considered all the evidence; that their unanimous opinion was, that there should be a verdict for the plaintiff; and that it was of no use their retiring. The judge refused to receive the verdict, and discharged the jury. *Held*, that a rule *nisi* might be granted, calling upon the judge, the registrar, and the defendants, to show cause why the verdict should not be received and entered upon the minutes, why judgment should not be given for the plaintiff, and why execution should not issue thereupon.—(*Jardine v. Smith*, 8 W. R. 464.)

THE

# JOURNAL OF JURISPRUDENCE.

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BIOGRAPHICAL SKETCHES OF THE COLLEGE OF JUSTICE.

No. II.

It is unfortunate that, in proceeding to sketch the more notable Senators of the College of Justice during the second half century of its existence, we should have to begin with John Graham of Halyard, who was originally a Justiciary Judge, but became an Ordinary Lord of Session in June 1584. One of the first notices of Graham's malpractices is contained in the curious "Memoirs of the Affairs of Scotland," in the reign of James VI., written by David Moyses, "for many years an officer of the King's household." Moyses states, that in June 1590 a Convention of the Estates was held at Edinburgh, "wherein it was expected that a reformation would be made of all things that were disordered in the state and commonweal. It was thought they would have proceeded to depose some of the Lords of Session, and to bring about a reformation therein (!). Some accusations and challenges passed in the meantime betwixt Mr John Graham of Halyard, one of the Lords of Session, and Mr David M'Gill, the (Lord) Advocate, each of them accusing the other of leading of false process, of bribery, selling of actions, and other things." Rather a scandalous state of matters, and one much requiring reformation at the hands of the Convention of the Estates, if they could effect it. What truth there was in the charges against M'Gill, we have not now the means of knowing. But Graham's subsequent career gives but too much colour to the accusations directed against him. In 1592 he produced, in an action of removing against certain of his tenants on Halyard, a notarial instrument which the defenders challenged as a forgery. A warrant having been obtained, the notary was ap-

prehended, and confessed that the instrument had been brought to him, complete except the signature, by William Graham, the pursuer's brother, and that he had subscribed it knowing nothing of the matter. He was tried, convicted on his own confession, and hanged. Graham thereafter raised an action against Mr Patrick Simpson, minister at Stirling, alleging that he had seduced the notary into the confession which he had made. Simpson complained to the Assembly, who cited Graham to answer for the scandal. He appeared, and declared "that he would prove what he had alleged before the judge competent." The Assembly insisted "that he must qualify it before them, otherwise they would censure him as a slanderer." At this stage, the Lord President (Baillie of Provand) and two of the Senators (Lords Culross and Barnbarroch) were sent by the Court, to desire the Assembly not to meddle in causes proper to their (the Court's) cognition, and especially in the case between Lord Halyard and Mr Patrick Simpson. The answer of the Assembly is well worthy of being recorded, as showing the independent yet reasonable spirit which prevailed in its councils then: they replied, "that what they did was no way hurtful to the privileges of Session, nor were they minded to meddle in any civil matter, but in the purging of one of their own members they might proceed without the prejudice of the civil judicatory; therefore wished them not to take ill the Church's dealing in the trial of one of their own number." Graham was then called again, but continued to decline the jurisdiction of the Assembly. The Assembly repelled the declinature, and ordered him to "say what he could in his defence, otherwise they would give process and minister justice." He thereupon protested and withdrew. The Court then determined to interdict the Assembly from proceeding further in the matter; but at length it was hushed up, though upon what precise footing, is not apparent. Graham, who was a bold, if a bad man, still continued his proceedings against the tenants, who, in their turn, went against the heir of Sir James Sandilands, from whom they had derived their rights. The heir was a minor; but his uncle, Sir James Sandilands, a man of a fierce temper, determined to have revenge against Graham. He accordingly obtained, through the Duke of Lennox, an order for him to leave Edinburgh. As Graham was departing down Leith Wynd, a scuffle arose between his people and those who, with the Duke and Sir James, were following him. In this affair Graham was shot; and in Spotswood's quaint

words, "Sir Alexander's Stuart's page, a French boy, seeing his master slain, followed Mr John Graham into the house, downped a whinger into him, and soe despatched him." Graham was a disgrace to the bench, and well deserved the title given him in James Melville's Diary, "My Lord Little Justice."

Sir Lewis Bellenden, eldest son of Sir John Bellenden of Auchimone, succeeded his father as Justice-Clerk in 1578, and in 1584 he became an Ordinary Lord of Session. He was frequently employed on diplomatic missions, and died in 1591. It is a curious sign of the times, that, as Sir John Scot relates (*Staggering State*, p. 130), Sir Lewis' death was said to have been caused by his dealing with a warlock named Richard Graham. According to Scot, the Justice-Clerk requested the warlock to "raise the devil, who having raised him in his own yard, in the Canongate, he was thereby so terrified, that he took sickness and thereof died." It is probable that Sir Lewis' malady arose from a much less supernatural cause; but it is by no means unlikely that he had dealings with necromancers, whose pretensions were largely recognised in that age.

Alexander Seton, successively Lord President and Lord High Chancellor, was a man of very considerable eminence, both as a lawyer and as a politician. A younger son of his noble house, he was intended for the Romish Church, to which his family were staunch adherents. Whilst studying at Rome, he "gave a remarkable proof of early rhetorical talent by the delivery of a Latin oration of his own composition (*de ascensione Domini*) before Pope Gregory the XIII., and the conclave of cardinals and prelates assembled in the Pope's chapel in the Vatican, on the day of one of the great festivals of the church. Seton had not then completed his sixteenth year" (*Tytler's Life of Craig*, 232). Circumstances, however, induced him to relinquish clerical, and betake himself to legal, studies. Accordingly, after spending several years studying civil and canon law, he again went through a rather trying ordeal, designed no doubt to do him honour, and occasioned by his father, Lord Seton's, great influence at Court. When the time arrived for passing his trials as an advocate, the King, the Senators of the College of Justice, and the members of the Faculty of Advocates, all assembled in the Chapel Royal of Holyrood, and before them "he made his publick lesson of the law, in his lawer gown, and foure nooked cape (as lawers use to pass their tryalls in the universities abroad),



to the great applause of the King and all present, after which he was received by the College of Justice as ane lawyer" (*History of the House of Seton*). It was rather dangerous for any man to be so heralded into public life; but Seton possessed sterling qualities, which enabled him to withstand the adverse influence of all this trumpeting. Raised to the bench as an Extraordinary Lord in 1585, at the age of thirty, and as an Ordinary Lord in 1587, he speedily displayed his ripe learning as a lawyer, and great sagacity as a judge. It was therefore no less due to his own merits than to Court favour that, in 1593, he was promoted to the President's chair, on the death of Baillie of Provand. Remaining strongly inclined to, if not avowedly of, the Catholic persuasion, Seton was naturally obnoxious to the Reforming party then dominant, and had on one occasion to appear before the Synod of Lothian to clear himself from certain accusations which had been brought against him. Wonderful to say, he was successful. But though purged for the time, Seton still continued the object of the strong dislike of the clergy, who called him "that Romanist President, a shaveling and a priest, more meet to say masse in Salamanca nor to bear office in Christian and Reformed commonwealls." The King, however, was wonderfully constant to him; compelled the town of Edinburgh, very reluctantly, to elect him Provost for ten years in succession; created him first Lord Fyvie, and afterwards Earl of Dunfermline; and when he (James) was called to England, on the death of Elizabeth, entrusted to his care the education of Prince Charles, afterwards Charles I. How many of that unhappy monarch's high church and divine right of kings ideas may have owed their origin to the prejudices of his early instructor, it is impossible to say. One thing, however, is clear, that Charles learned nothing of Seton's sagacity and moderation,—qualities for which he received the approbation of men so unfavourably inclined towards him as Spotswood and Calderwood. He was clearly a man of a high order of intellect, and managed in very difficult times to play a very difficult part with remarkable success.

Sir Thomas Lyon, Master of Glamis, appointed an Ordinary Lord in 1593, was engaged in almost all the plots of those days of conspiracy and violence. He it was who, when James VI., on finding himself a prisoner at Ruthven, burst into tears, exclaimed, "'Tis better bairns weep as bearded men." Lyon's qualifications for the bench have not been recorded.

James Elphinstone, afterwards Lord Balmerino, was appointed an Ordinary Lord in 1587. He was nominated one of the Octavians in 1596, became Secretary of State in 1598, and in 1605 Lord President. Whilst Secretary of State, Elphinstone, in order to procure a cardinal's hat for his relation Drummond, Bishop of Vaizon, obtained, without his knowing the nature of the document, the signature of James VI. to a letter, commendatory of Drummond, to Pope Clement VIII. Nearly ten years afterwards he was called in question for so acting; and after many negotiations, far from creditable to any concerned—King, counsellors, or accused,—he was tried for treason, convicted, and sentenced to be beheaded as a traitor. The sentence was not carried into effect; but after a certain time spent in banishment, Balmerino died in 1612, it was said of a broken heart. One chief cause of all his misfortunes was, that he dared to make himself the avowed rival of Cecil for the office of Secretary. Cecil never forgave him, and ultimately caused his downfall.

Of all the turbulent spirits, who gave their character to the times, none was more violent than John Colvil, whom we first hear of as minister of Kilbride, and precentor of Glasgow. He did not hold his clerical preferments long; but resigning them, procured for himself the office of Master of Requests. For his concern in the Raid of Ruthven, he suffered forfeiture and imprisonment; but was restored, and appointed in 1587 an Ordinary Lord of Session in the place of his uncle, Lord Colvil, Commendator of Culross. The bench, however, suited him no better than the precentor's stall; and after sitting for nineteen days, he resigned his judicial position. From that time forward he joined in all the conspiracies and outrages of the Earl of Bothwell, whose constant adherent he became, till he was obliged to flee the country on that nobleman's final discomfiture. In his exile Colvil became a Roman Catholic and bitter opponent of the Protestant faith, against which he composed several lucubrations long since forgotten. He died in the year 1607, while on a pilgrimage to Rome.

Thomas Hamilton, nicknamed "Tam of the Cowgate," afterwards Lord President and Earl of Haddington, was appointed an Ordinary Lord in 1592. He was a man of considerable ability, and had received a careful legal education in France; but his time was so occupied with his numerous other offices, that but little of it was devoted to the discharge of his judicial functions. He was one of

those who at the same time acted as a Lord of Session and as King's Advocate. His doing so occasioned so much popular discontent, that an Act of Sederunt was passed, on 22 Feb. 1597, by which (*Haig and Brunton*, p. 223) it was provided, that in cases in which he was pursuer for the King's interest, "he was not to be considered as a party." It would have been, one would think, a more satisfactory provision, that in such cases he should not sit as a judge. In 1607 he was made Master of the Metals; in 1612, Clerk Register; and soon after, Secretary of State. In 1615 he was created a Peer as Lord Binning, and in 1616 he was made President of the Session. As an instance of his judicial acuteness, *Scots-tarvet* relates (*Staggering State*, p. 69, *note*), "that in an action of improbation of a writ, which the Lords were convinced was forged, but puzzled for want of clear proof, he, taking up the writ in his hand, and holding it betwixt him and the light, discovered the forgery of the stamp of the paper; the first paper of such a stamp being posterior to the date of the writ quarrelled." In 1626 Hamilton resigned his position as President, and was appointed to the office of Lord Privy Seal, the last of the long series which he had held. He died in 1637 at a very advanced age, leaving behind him great wealth, but a somewhat chequered character, as the following epitaph, preserved by Sir James Balfour, testifies:—

"Heir lyes a Lord quho, quhill he stood,  
Had matchless bein had he beene——  
This epitaph's a sylable short,  
And ye may add a sylable too it;  
Bot quhat y<sup>e</sup> sylable doeth importe,  
My defuncte Lord could never doe it."

The next name calling for notice is one of the best known in Scottish legal literature, that of Sir John Skene of Curriehill. Sir John was born in the year 1549, and spent many years whilst a young man in the northern countries of Europe, with whose languages and laws he became familiar. In 1574 he was admitted an advocate, and soon rose to distinction at the bar. When the Regent Morton formed his great project for a general digest of the Scottish Laws, the execution of the plan was committed to Skene, in conjunction with Sir James Balfour, the reputed author of the "*Practicks*." For several years Skene devoted himself to the execution of this commission, which, however, led to no practical results; the fall of the Regent having put an end to the powers of the Commis-

sioners. Skene's acquaintance with Scandinavian laws and literature procured him the appointment of legal adviser to Sir James Melville, when on one occasion he was appointed ambassador to Denmark by James VI. "When I schew his Majeste," says Melville, "that I wald tak with me for man of law Mr John Skine, his Majeste thocht then that there wer many better lawers. I said that he was best acquanted with the conditions of the Germanes, and culd mak them lang harangues in Latin : and was a gud, trew, stout man, lyk a Dutche man. Then his Majesty was contente that he suld ga ther with me." Melville never went to Denmark, but Skene accompanied the Earl Marischal's embassy to that country. In 1594 he was appointed successively Clerk Register and an Ordinary Lord of Session. Two years previously, however, he received the commission for that work with which his name is most familiarly connected. The Parliament of 1592 passed an Act, ordaining the Chancellor (Thirlestane), assisted by the most distinguished lawyers of the day, to examine "the lawes and actis maid in this present Parliament, and all otheris municipall lawes and actis of Parliament bygane . . . and to consider quhat lawes or actis necessarlie wald be knawin to the subjectis," with the view to their being printed by authority. The whole labour of the Commission devolved on Skene, who worked so assiduously, that in 1598 he had completed his collection of the statutes from James I. downwards. He received great praise for the manner in which he had performed his arduous task, and was thereby emboldened to undertake one more arduous still, viz., "the giving to his countrymen, for the first time, a collection of the more ancient laws of the realm." Well might he say, that when he began his work he found he had "fallen into an Augean stable, which scarce the labour of a Hercules could suffice to cleanse or purify." Fifteen years were spent by Skene on this great undertaking; and then, in 1607, he presented to Parliament a volume containing the *Regiam Majestatem* and the *Quoniam Attachiamenta*. This second contribution to the ancient statute law of the country gained for its author the highest reputation, which lasted during his own life quite unimpaired. Later legal antiquaries, however, have done much to shake, if not to destroy, Skene's renown. Successively, Lord Hailes, Thomas Thomson, and Mr Tytler, have shown that he was a most perfunctory, if he was not an altogether unfaithful, editor; and the *Regiam Majestatem* has not been more conclusively demonstrated to be a mere imitation of

the famous work of Glanville, than Skene has been shown to have been unworthy of the high fame he at one time obtained in a path almost untrodden before his day. No one can deny him the merit of great industry; but there is only too much truth in the severe stricture of Tytler, who says (*Life of Craig*, p. 253), Skene "is one of those whose names have stood highest during their lifetime, whose celebrity, as it has been founded more upon the ignorance of their contemporaries than upon his own learning, is now gradually waning, with increasing knowledge; and who, for a brilliant but ephemeral living reputation, has been content to forfeit all very lasting claims upon the gratitude of his country." Skene's treatise, *De Verborum Significatione*, it should be stated, is still a work frequently referred to for the explanation of ancient Scottish law terms. He died in 1612.

John Preston of Fentonbarns rose from a very humble station—his father having been a baker in Edinburgh—to the place first of an Ordinary Lord, and then of the President of the Session. The mode in which he obtained his seat on the bench was somewhat singular, and quite characteristic of the King, James VI., who was constantly making experiments in government. Instead of presenting to the vacant seat one person, of whose qualifications the Court should take cognisance, James, "throw the affection he beirs to ye avancement of justice, . . . nominat and presentit to the saides senatouris, Mr Peter Rollock, Bishop of Dunkeld, Mr David M'Gill, now of Cranstonriddell (the son of the defunct senator), and Mr Johnne Prestone of Fentoun, all of sufficient condicione and qualitie to the effect the saidis lordis may elect ye worthiest in thair jugement." The Court thereupon proceeded to examine the three nominees, and "*conjectis in pileum nominibus*, electit and chosit the said Maister John Preston as maist qualifeit to occupy ye rowme in Session." Administrative Reformers of the present day are still behind the Scottish Solomon; for we are not aware that they have as yet proposed the institution of competitive examinations for seats in the supreme tribunals of the country. The time may come, however, when such things shall be; and they certainly have a starting-point, formal it may be, in the probationary trials which even now newly-appointed judges of the Court of Session have to undergo. The Mr David M'Gill whom we have above noticed as defeated by Preston in the competition for the vacant seat, was afterwards promoted to the bench. Almost the only noteworthy thing in connection with him is, that he was appointed a

member of a commission, for which his rival and colleague Preston was hereditarily better qualified, regarding "ane greit abuse usit be meilmakers within the boundis of Lowthiane, in caussing grind the haill aittis and schilling, and making mair meill in ane boll greit aittis nor ane boll meill, quhairthrow the haill subjectis susteinis greit lose and skayth in paying also deir for dust and seidis as gif ye samyn wes guid meill." Whether Lord Cranstonriddel and his fellow-commissioners fell on any device for making the millers honest, does not appear.

Edward Bruce, Commendator of Kinloss, who was appointed an Ordinary Lord of Session in 1597, was a man of great address and sagacity. He was frequently employed by James VI. on delicate missions to England, and did much to pave the way for his quiet succession to the throne of that country on the death of Elizabeth. For his services, James raised him to the peerage as Lord Bruce of Kinloss; and on his accession to the throne of England, he took him with him to that country. There he became Master of the Rolls, when he resigned his seat on the Scottish bench. This is the only instance we know of a Scottish judge ascending the English bench. In those days, however, the Master of the Rolls had more to do with the custody of the Records than with judicial functions; and Bruce had by far too much sagacity, and acquaintance with men and manners, not to be able to discharge with credit the duties of any judicial office, however foreign to his early habits and education. He died in 1611.

The career of Sir David Lindsay of Edzell, who was admitted to the bench in 1598, was more than ordinarily characterized by deeds of violence and blood. In 1583 he was obliged to obtain letters of remission under the Great Seal for his concern in the murder of John Campbell of Lundie. In 1605, for his connivance at a fray in the High Street of Edinburgh between his son and Wishart of Pitarrow, he was cited before the Privy Council, and sentenced to imprisonment in Dumbarton Castle,—the Court of Session excusing his absence "during his being in ward"! Again, in 1609, the Privy Council fixed the day of his trial for concern in the death of Lord Spynie; but the trial did not take place in consequence of the absence of the prosecutor. He died in 1611.

Sir Lewis Craig, son of the great feudalist, Sir Thomas Craig, after a careful education in philosophy, etc., at Edinburgh, and in

civil law at Poitiers, passed as advocate in 1600; and four years afterwards, when thirty-four years of age, he was knighted and made an Ordinary Lord of Session. His judicial style was Lord Wrights-houses or Wrights-lands, one not a whit more euphonious than some of those titles which in recent times have been suggested for learned judges who happened to have no territorial possessions of their own from whence to derive their title. In passing, we may just observe, though the observation is rather irrelevant to the matter in hand, that now-a-days, when the landed gentry have no longer a monopoly of seats on the bench; when, on the contrary, it is the exception rather than the rule that those who attain the judicial dignity are members of that class—it is high time to abolish the old territorial designations, and to style our judges Mr Justice Smith or Mr Justice Brown. If we must have *Lords* of Session, by all means let their Lordships be knighted; and thus an incongruity often productive abroad of unpleasant observations would be avoided, and intelligent foreigners, familiar with our aristocratic customs, would no longer be led to indulge in a significant smile when they encountered Lord A. and Mrs B. travelling together on the Continent in the intimacy of the conjugal relation. To return, however, to Sir Lewis Craig, there is but one further circumstance connected with him which it is necessary to mention, but it is one highly honourable to him. He was promoted to the bench, as we have seen, in 1604, whilst his father, Sir Thomas, still practised at the bar. “The Supreme Judges in those days sat covered, and heard the counsel who pleaded before them uncovered. Whenever,” says his biographer, “his father appeared before him, Sir Lewis, as became a pious son, uncovered, and listened to his parent with the utmost reverence” (*Tytler's History of Sir T. Craig*, p. 150). Sir Lewis died in 1622.

Sir James Skene of Curriehill, who succeeded his father Sir John as an Ordinary Lord in 1612, and became President of the Court in 1626, was not in any way remarkable for learning and talent. When his father felt the infirmities of age increasing upon him, he sent Sir James to Court, with power to resign his office of Clerk Register, provided he were himself appointed in his stead. Sir James, however, was no match for the political intriguers among whom he was thrown in London. Accordingly, he was frightened or cajoled into a surrender of the Clerk Registership, on condition of obtaining for himself the much less lucrative and important office of an Ordinary Lord of Session. It is said Sir John

was so chagrined at this, that he died in a few days afterwards of "pure vexation." Sir James held the office of Lord President for seven years, and died in 1633.

Sir Gideon Murray of Elibank originally studied for the Church ; but having, as Scotstarvet states, "unhappily killed a man named Aitchison, was for that slaughter imprisoned in the Castle of Edinburgh ; and being a well-favoured youth, got favour from Captain James Stewart's lady, who then ruled all, and by her means was released, and got a remission." This lady, to whom Murray owed so much, and whose husband afterwards became the Chancellor Arran, was a very remarkable woman. "She was accustomed," according to Scotstarvet, "to sit in the Session on the bench beside the Lord in the Outer House, who called no tickets of causes but by her order ; styled Mr Maitland, thereafter Chancellor, her man Maitland," and committed many other acts, prompted not less by an eccentric vanity than by consciousness of power. In the gossip of those times it is told of her, that she consulted witches as to the future fate of her family, and got for reply that "she should be the greatest woman in Scotland, and that her husband should have the highest head in that kingdom." A prediction which is said to have had its fulfilment in her death of the dropsy, and in the Earl's having been killed by Lord Torthorval in a border fray, and his head carried on a lance point "till it was brought to a churchyard." After holding several subordinate offices, Murray was in 1613 appointed an Ordinary Lord of Session ; and, about the same time, his cousin Robert Kerr, afterwards Earl of Somerset, the Lord Treasurer, appointed him his Depute, in which office he continued for many years. Sir Gideon's administration of the revenue was so excellent, that, as Scotstarvet relates, he "not only repaired all the King's decayed houses,—viz., Holyrood House, the Castle of Edinburgh, Linlithgow, Stirling, Dunfermline, Falkland, and Dumbarton,—but added to them all new great edifices ; and had so much money in the King's coffers at King James VI.'s coming to Falkland in 1617, that therewith he defrayed the King's whole charges, and those of his Court, during his abode in Scotland ; whereby he was so well loved and respected of his Majesty, that when he went thereafter to the Court of England, there being none in the bed-room but the King, the said Sir Gideon, and myself, Sir Gideon by chance letting his chévron fall to the ground, the King, although both stiff and old, stooped down and gave him his glove, saying, "My



predecessor, Queen Elizabeth, thought she did a favour to any man who was speaking with her, when she let her glove fall, that he might take it up and give it to her; but, sir, you may say a king lifted your glove." Sir Gideon's long and faithful services, however, could not protect him against the fickleness of his master's disposition; and a few years afterwards, in 1621, having been unjustly accused by his enemies of malversation in office, James lent a willing ear to the accusations, and ordered him to be sent home as a prisoner, and a day to be fixed for his trial. Sir Gideon was so much grieved by this treatment that he took to bed, and, if we are to believe Scotstarvet, resolutely starved himself to death. This was a sad ending to a career of so much usefulness and honour; but so perished most of those who put their trust in that foolish and cruel prince, the sixth of our Jameses.

Sir Alexander Gibson of Durie, admitted to the bench in 1621, is well known for his collection of decisions, from the date of his appointment down to 1642, when he was elected President of the Court for the Summer Session of that year. Sir Alexander married the eldest daughter of Sir Thomas Craig; and Mr Tytler notices the curious fact, that the contract of marriage, signed both by Sir Thomas and by Lord Durie, contains no date in *gremio*,—its actual date being ascertained only from the subscription of a notary who guided the hand of Lord Durie's mother, she not being able to write. One has often heard that lawyers constantly bungle their own wills; but it might be expected that they would pay more attention to their marriage-contracts. Durie was a man of great learning, and of much influence among his judicial brethren. That same influence once brought him into sore trouble, if one is to believe, as there seems no room for doubting, the truth of the story told by Forbes in the preface to his *Journal of the Session*, and which is the chief burden of the well-known ballad of "Christie's Will," in the third volume of the *Minstrelsy of the Border*. Following the narrative of the ballad, it would appear that Lord Traquair, who had a law-suit in the Court of Session, went to the tower of "Christie's Will," a famous border freebooter, and having gained admission, was thus interrogated by Will:—

"Now wherefore sit ye sad, my lord?  
And wherefore sit ye mournfullie?  
And why eat ye not of the venison I shot,  
At the dead of night, on Hutton Lee?"

“ O weel may I stint of feast and sport,  
 And in my mind be vexed sair !  
 A vote of the canker'd Session Court  
 Of land and living will make me bair.  
 “ But if Auld Durie to heaven were flown,  
 Or if Auld Durie to hell were gane ;  
 Or . . . if he could be but ten days stown, . . .  
 My bonny braid lands would still be my ain.”

To this Will thus made reply :—

“ O mony a time, my lord,” he said,  
 “ I’ve stown the horse frae the sleeping loun ;  
 But for you I’ll steal a beast as braid,  
 For I’ll steal Lord Durie frae Edinr. town.  
 “ O mony a time, my lord,” he said,  
 “ I’ve stown a kiss frae a sleeping wench ;  
 But for you I’ll do as kittle a deed,  
 For I’ll steal an auld lurdane aff the bench.”

Will accordingly goes to Edinburgh, and carries off his Lordship dressed up as an old crone, and then the ballad proceeds :—

“ Willie has hied to the tower of Græme,  
 He took Auld Durie on his back ;  
 He shot him down to the dungeon deep,  
 Which garr’d his auld banes gie mony a crack.  
 “ For nineteen days and nineteen nights,  
 Of sun or moon, or midnight stern,  
 Auld Durie never saw a blink,  
 The lodging was sae dark and dern.”

At length the law-suit being decided in the Earl’s favour, “ Auld Durie” was sent back to his sorrowing relatives. A strange picture of the times.

Sir Robert Spottiswood of New Abbey and Dunipace, son of the Archbishop of St Andrews, after taking his degree of M.A. at Glasgow, spent no less than nine years at the University of Oxford and at various universities on the Continent, studying law and literature, till he became one of the most learned scholars and lawyers of the time. In 1626 he was appointed an Ordinary Lord, and in 1633 elected as President of the Court. He was an object of such great dislike to the Presbyterian party, who at that time were in the ascendant, that he was obliged to flee into England, where he remained till Charles paid his second visit to Scotland. Returned again to Edinburgh, he was obliged to appear before

Parliament as a promoter of the quarrel between the King and his people. In 1641 he was committed to the Castle on the same charge, but was not long detained there. In 1645 he was appointed by Charles to act as Secretary of State; and having in that capacity passed a commission, creating Montrose the King's Lieutenant in Scotland, he actually travelled from Oxford to the wilds of Perthshire in order to deliver the commission to the Marquis. Remaining with Montrose, he was taken prisoner at the battle of Philiphaugh; after which he was again brought before Parliament, and for his acts, especially that last mentioned, sentenced to be beheaded. The sentence was carried into effect,—Spottiswood proving himself on the scaffold a man of great courage and firmness. None have ever attempted to deny President Spottiswood's great learning and ability. A keen controversy, however, has been maintained between the writers of different sides as to his integrity on the bench: Bishop Burnet and the Royalists contending that he was no less distinguished for ability than for integrity; the partisans of the Parliament, on the contrary, declaring that he was not above the vulgar influences of corruption. With whom the truth lay, it is now impossible to say. Sir Robert is well known as the collector of the Reports called *Spottiswood's Practicks*.

Sir Archibald Napier of Merchiston, the eldest son of the celebrated mathematician, and afterwards Lord Napier, held the offices of Justice-Clerk and Ordinary Lord of Session for a short time in the year 1624. The former office he resigned, and from the latter he was removed on account of his being at the same time Treasurer-Depute for life. Lord Napier espoused the side of Charles I. in his quarrels with the Parliament, bringing himself into much trouble thereby. He escaped from the field of Philiphaugh, and died soon after, in the seventieth year of his age. In early life Napier devoted much attention to the science of agriculture, then in its infancy; and, in 1598, it appears that he obtained a patent for "miking, labouring, and manuring, of all and whatsoever lands, absweill manurit and riven out as unmanurit, within the hail bounds of this realme, absweill to coirne as to pasturage and meadows, during the hail space of twenty-one years next efter his entrie thereto."

Sir Andrew Fletcher of Innespeffer was appointed a Senator of the College of Justice in 1623. He would appear to have been a man of considerable sagacity, and much relied on in the conduct of

public affairs. He was a member of many useful commissions, the labours of some of which were productive of much benefit to the country, while those of others only failed of their object from the troublous circumstances of the times. Fletcher was an active and influential commissioner in the Estates, and struggled hard to prevent the surrender of Charles I. to the English army. At one time he succeeded in gaining a majority to his views; but they were ultimately defeated, through the defection of the Duke of Hamilton. He died in the year after the Regicide.

Sir James Learmonth of Balcomie became an Ordinary Lord in 1627. He was the colleague of Fletcher in several of the commissions which we have just mentioned, and, like him, was a man much esteemed for his prudence in the management of public affairs. On more than one occasion he was temporarily elected President of the Court. During the Commonwealth, he was appointed one of the "Commissioners for the administration of justice to the people of Scotland," and, while discharging his duties in that capacity, he suddenly expired on the bench in June 1657. Of Learmonth's character, death, and burial, the following quaint description is given in the *Diary of John Nicoll* (p. 198): "A man verrie paynefull in his office, and willing to dispatche bussiness in this sad tyme, depairted this lyff evin in a moment, sitting upone the bensch in the Parliament Hous, about nyne in the clok in the morning, to the great greiff of much pepill. His corps wes honorable burreyit in the church kirk yaird in Edin<sup>r</sup>., with such numberis of pepill as wes admirable, and haid murniris befor and following the bear, above fyve hundreth persones. His removing fra that bensch was esteemed to be a nationall judgement."

We come at last to Sir John Scot of Scotstarvet, a writer from whose caustic pages we have derived much of the information we have above given as to his predecessors and contemporaries. Sir John was first appointed Director of Chancery, an office which he held for half a century. In 1632 he became an Ordinary Lord of Session. In 1638 he, along with Lords Craighall, Durie, and Ennerteil, refused to take the King's covenant, though hard pressed with his brethren (the rest of whom yielded) to do so. Whether it was that Sir John was a trimmer,—and yet, that idea seems excluded by his conduct just mentioned, in refusing to take the King's covenant—we know not, but he had the trimmer's fate, and was persecuted by both parties; Oliver Cromwell fining him L.1500 stg. in

1654, and Charles II. in his turn amercing him in the sum of L.500. It was very likely this treatment which gave its pungency to Sir John's well-known treatise on the *Staggering State of Scots Statesmen*. It was the design of Sir John in that work, says Ruddiman in his preface, "to point out the various methods by which the statesmen attained to power, the unstable footing on which they maintained it, and by what means they either fell from their glory, or afterwards, in themselves or families, suffered the punishment of their oppressions and rapine." It is truly, as a manuscript annotator has said, "a melancholy view of ambition and human greatness" which the *Staggering State* presents. No doubt, to some extent, as we have already suggested, Sir John's opinions were distorted and biassed by the circumstances of his life and temperament; but there is only too much truth in the picture he presents of the littleness of great men, and the self-seeking of professed patriots,—a picture for which the materials exist not only among the Scots statesmen "for one hundred years, viz., from 1550 to 1650," but among the statesmen of all ages and every country. The *Staggering State* is a valuable repertory of curious anecdotes, collected at the time to which they relate by one who had the best means of knowing their accuracy, and who had the power of telling them in a most quaint and graphic manner. Much less generally known, but probably more valuable, were Scotstarvet's labours in connection with two very famous contributions to Scottish literature and science,—the *Delitæ Poetarum Scotorum*, and the *Theatrum Scotiæ* of Blaeu's Atlas, published at Amsterdam in 1662. The former work consisted of Latin poems composed by Scottish writers, and collected by Sir John, acting in conjunction with the famous Arthur Johnston, himself a poet, scarcely, if at all, inferior to Buchanan. The high estimation in which Johnston held his fellow-labourer is apparent from many passages of his graceful preface. After mentioning some of the great losses to Greek and Latin literature from the neglect of the ancients, he thus addresses Scot: "tu hac infamia et sæclum et gentem tuam liberas, dum popularium tuorum sibyllina folia, vel salsamentariorum manibus, vel tinearum dentibus erepta, ad posteros transmittis." Again, he inquires, in allusion to Sir John's labours: "quid enim laudabilius, quam virum eminentem, et publicis negotiis districtum succisivas horas, quas plerique vel alea, vel crapula vel somno prodigunt, Musarum studiis consecrare? Quid gloriosius, quam cives et tribules suos, jam animam agentes, non

dicam a morte, sed ab ipsa etiam mortalitate vindicare?" It was under Scotstarvet's patronage that Timothy Pont made his famous survey of Scotland, which he did not live to complete. At his death, Pont's papers would have been lost, and his life's labour gone, had not Sir John interposed to preserve them, and further induced Robert Gordon of Straloch, and his son, to finish what yet remained to be done. Their maps, along with topographical notices of the various counties, furnished partly by the ministers of the church, whom Scotstarvet, in anticipation of Sir John Sinclair, had enlisted in the service, and largely by himself, were published, under the title of the *Theatrum Scotiæ*, in the sixth volume of Blaeu's famous Atlas, *Major sive cosmographia Blaviana*. To superintend the publication of this splendid contribution to Scottish topography, Sir John went over to Holland, though very far advanced in years, and laboured most assiduously in order to secure that the information given should be both full and accurate. Blaeu expresses, in no measured terms, his admiration of the old man's zeal and energy. Sir John attained a great age, and died in 1670 in his eighty-fourth year. Few of his contemporaries have so good a claim on the gratitude of posterity; and we willingly close this period with the name of so useful and patriotic a citizen as Sir John Scot of Scotstarvet.

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INCONSISTENCIES OF THE LAW OF EVIDENCE.

WHILE the happy results of recent legislation on the law of evidence are now so apparent, we may still admit the ingenuity of that judicial system founded by the wisdom of our ancestors, whose principle appears to have been, that the most perfect and unclouded vision was only to be obtained by resolutely closing the eyes against all outward sources of illumination. In such a system, in which every person likely to know anything of the subject matter of the action was excluded on some ground or other from giving evidence, the wonder is how the truth was arrived at after all. The secret of the explanation may be illustrated by the well-known anecdote of the American duellists, who agreed to fight with pistols in a dark room. One of the combatants, not wishing to run the risk of inflicting a wound which might be fatal, hit upon the novel and, as he thought, prudent expedient of firing up the chimney.

To his great surprise, the shot took effect, and he succeeded in dislodging the adversary, whose honour, if we may credit the Hudibrastic distich, would not receive either solace or satisfaction from such a passage of arms. And so, too, it often happened, when all light was excluded from the apprehension of a judge by the restriction of an ancient and barbarous code, that the cowardice or imbecility of a dishonest litigant would betray him, at a time when his adversary, if left to his own guiding, would have been powerless to injure him. But we are not going to apologize for the old law of evidence, and still less to enter on a detailed exposition of the new. Our object is to point out some particulars on which the law of evidence is susceptible of amendment; and, as preliminary to that end, a very short summary of what has already been accomplished may suffice.

The first of the recent statutes on evidence was passed in 1840 (3 and 4 Vict., cap. 59), its chief purpose being to abrogate the rule by which witnesses were excluded on the ground of relationship. Under its provisions, it became competent to adduce and examine as witnesses all persons standing in any degree of relationship to the party adducing, except when standing in the relation of husband and wife. The *metus perjurii* even in 1840 seems to have been too strong to allow of any further extension being entertained. The next Act, passed in 1852 (15 and 16 Vict., cap. 27), made great havoc amongst the old exclusionary rules. It provided that no one should be excluded from giving evidence (sec. 1) "by reason of having been convicted or having suffered punishment for crime, or by reason of interest, or by reason of agency or of partial counsel, or by reason of having appeared without citation, or by reason of having been precognosced subsequently to the date of citation." These were all good objections to the admissibility of a witness, and such objections were sustained, at least to some extent, on the very slightest grounds. To have copied or read any of the papers in process was in most cases held sufficient, on the ground of agency and partial counsel, to exclude the evidence of the most disinterested witness; and although, in a few cases, the witnesses were received, the deliverance of the Commissioner or the Judge set forth with great gravity that such evidence was only received *own nota*. But while it was provided that agency and partial counsel were not in future to exclude the testimony of a witness, the witness-box was still to be strictly fenced against the admission of the actual agent:

"It shall not be competent to adduce, as a witness in any action or proceeding, any person who shall at the time when he is so adduced as a witness be acting as agent in the action," etc. This Act further allowed the examination of any one who, though appearing as a party to the action, had no substantial interest in its result. If he were nominally a party to the action, his testimony was admissible, not so if he had any substantial interest. The last of the Evidence Amendment Statutes was passed in 1853 (16 and 17 Vict., cap. 20), and was greatly in advance of the other two. It repealed the previous statute, in so far as it excluded the agent in the cause from being a witness, allowed the parties to the action to become witnesses for themselves or their opponents, and allowed husband and wife to be adduced as witnesses for each other; but it provided that nothing contained in the Act should apply to certain enumerated consistorial actions. Thus, from the exclusion of the parties and their relatives, we have advanced to the admission of both without distinction; from the exclusion of persons on the ground of interest, we have advanced to the admission of the very parties to the suit; and from the exclusion of others on the ground of agency or partial counsel, we have advanced to the admission of the agent in the suit at the very time of his examination as a witness, except in a mere handful of cases enumerated in the last statute. These are great and radical changes, and it may be truly said, that little remains now for complaint on the score of the exclusion of testimony. But there are exclusions still existing, such as those reserved by the last-mentioned statute, and others where the exclusion operates less against the mere admission of the testimony than against its admission to certain effects. It would be well that these last rags of the system of exclusion were swept away,—a system which, more than half a century ago, Jeremy Bentham described as being calculated more frequently to *produce* than to *prevent* injustice, adding, with characteristic emphasis, that it would be a prodigious benefit to justice if exclusion of evidence were itself for ever and in every instance excluded.

We have observed that, as a general rule, the evidence of husband and wife is admissible for and against each other. In consistorial actions such evidence is not admissible, though it does not appear that there is any good reason for the distinction. Almost the first step in an action for divorce is the oath of calumny taken by the pursuer. Under it the pursuer must swear that he or she believes



the statements in the summons to be true, and that the action proceeds on no collusive arrangement. While such evidence of motives is not only admitted but required from the pursuer, that same person is excluded from speaking to facts which he or she knows, and which either of them may have seen, however important their bearing upon the merits of the cause. There can be no doubt that there is here an open door for injustice. If a husband or wife can speak to the merits of the action, from personal knowledge, to allow them to do so would only be allowing them to state the reasons they had for emitting the oath *de calumnia*. To admit the general deposition *de calumnia*, and exclude the statement of the facts on which that general deposition is founded, is obviously inconsistent. But we proceed to notice a most glaring inconsistency in the same branch of law. If a married woman raises an action of separation and aliment against her husband on the ground of cruelty and maltreatment, her evidence—the best evidence which could be adduced on the point—is excluded. It may be that her evidence is the only evidence which can be given to the nature of the assaults or cruelty libelled. It could, doubtless, and would require to be corroborated by other witnesses, who might speak to the nature of the external evidence of violence, attributed by the wife to the assaults made upon her; but it is as likely as not that no one but herself can speak to the acts of violence themselves. But her evidence is excluded, and she must either remain in her husband's house, subject to renewed and additional cruelty, or leave it without having any claim on him for that pecuniary assistance for her support which he is bound to supply. But if, instead of raising a civil action for separation and aliment, she adopts the more serious course of having her husband indicted and tried on the assault before a criminal tribunal, her evidence is freely admitted; indeed, it is the first and chief evidence on which the prosecutor relies for his verdict. Thus, where the wife claims the civil rights of separation, her evidence as to certain facts is excluded; but where her husband is being tried *ad vindictam publicam*, her testimony to the *same facts* is freely admitted. Is she more likely to commit perjury in the one case than the other? Or is her judgment less likely to be biassed by a desire to screen her husband, than by the vulgar anxiety to make out a good claim? A wife claiming that which is her right is surely not so likely to tell what is untrue in support of her claim, as she is (even when smarting under great wrongs) to make a

statement not perfectly true, or to keep back part of the truth, where the true narration of the whole facts would lead to the infliction of a heavy personal punishment upon her offending partner. But apart from speculation on the subject, it is plainly indefensible to admit the evidence of the same person as to the same facts, in criminal trials, and exclude it in a civil cause. That the one case is a public vindication, and the other the vindication of a mere personal right, is simply to assert a distinction without a difference, for it has never yet been maintained that public rights are to be vindicated in a manner in which it is impossible or illegal to vindicate private and personal rights.

Another instance of the inconsistent application of the rules of evidence may be found in those cases where it is essential to ascertain whether a living child had been born. It is well known that in such cases where the existence of the child affected the patrimonial interests of its parents or others, the legal proof of such existence was of an exceedingly limited character. The proof must be that the child was heard to cry, and no other evidence will be listened to in support of the allegation of life. How stringently this rule has been enforced is well illustrated in the case of *Robertson*, 23d January 1833 (11 S. and D. 297). In that case, it was alleged that the child had shown symptoms of life for three-quarters of an hour after its birth, had been seen to breathe repeatedly, and its heart distinctly felt to beat; but it was admitted that during that period it had not been heard to cry. This was held insufficient to establish that the child had been born alive, and the rights of parties were settled as if there had been no birth at all. From the argument advanced for the pursuer in that case, we quote the following:—"All other evidence of this (that is, of the child being born alive), except crying, is not absolutely excluded in all cases. Take the case of child-murder, and suppose the mother were proved to have laid violent hands on the child, in presence of witnesses, and strangled it immediately on birth, and that medical testimony established beyond doubt that the child had lived and breathed, but that the persons present had not heard it cry; could the mother possibly be acquitted? Most assuredly not. But what situation of matters would that be, that, in the Court of Justiciary, the child should be held to be alive, so as to subject the mother to capital punishment for its murder; while, in a civil question, regarding the same child, it would be held that it had never lived?" An in-

consistent and anomalous result, but a result unfortunately existing in as full force in 1860 as in 1833, though, since the passing of Mr Dunlop's Act, the necessity for investigations of this nature has, to a large extent, been obviated. In the Court of Justiciary, any argument in a case of infanticide, founded on the statement that the child had never lived, because it had not been heard to cry, would be simply laughed out of court. If the child was proved to have breathed, and its heart felt to beat, there would be no doubt entertained as to its having lived. But any proof of life, except that the child was heard to cry, is excluded in all cases where such life affects civil rights,—excluded, that is, to the effect of proving that a living child had been born.

Somewhat akin to the inconsistency which we have just been considering, is the next and last case which we purpose laying before our readers. In cases of concealment of pregnancy and child-murder, the results of an *inspectio corporis*, as reported by the examining medical man, form the chief evidence against the unfortunate panel. In the first mentioned class of cases, this is all the evidence which the Crown is bound to adduce in support of the indictment. If it appears from such *inspectio* that the prisoner has been lately delivered, she must, to prove her innocence of the charge laid against her, produce her child, or prove that she made known her pregnancy to some one, or that she called for assistance at the time of her delivery. The Crown, having proved that delivery has recently taken place, needs do no more; the panel must then clear herself. Accordingly, when a woman is apprehended on such a charge, an *inspectio corporis* is the first thing that takes place, and there is not, and never has been, any hesitation in enforcing such inspection, and founding on its results as evidence. But what is thus enforced and admitted to prove criminality in the Court of Justiciary, is not admitted to prove the innocence of a party in a civil suit. This has been lately decided, in the case of *Davidson*, decided 11th February 1860. There the wife sued her husband for a divorce, on the ground of several acts of adultery committed by him. It was alleged, *inter alia*, that he had committed adultery with a nurserymaid at one time in the employment of the parties. The pursuer endeavoured to establish this charge, but did not call the alleged paramour as a witness. The defender, however, did so, and under examination she deponed that she had never had illicit intercourse with the defender, nor with any other man. It was

then proposed by the defender to examine a medical gentleman of eminence, to state the results of an *inspectio corporis* of the alleged paramour which he had made, with the view of ascertaining whether or not she was, as she alleged, still *virgo intacta*, but the Court refused to admit the evidence of the proposed witness. We need not go into a detail of the grounds on which the Court arrived at this decision; but the chief ground was this, that as the Court could not compel the young woman to submit to another *inspectio* at the instance of the pursuer, it could not admit evidence which the pursuer had no opportunity of meeting. But further than this, a very grave doubt was suggested, whether such evidence could be admitted in any civil case. That which we have given as the chief ground on which the proposed evidence was excluded, would have been an excellent objection, had the proposed evidence been offered as conclusive of the case, in the same way as the decision of an arbiter is conclusive; but scarcely appears sound when applied to the admission of evidence merely tendered *quantum valeat*. We do not, however, go into the question here as to the soundness of this decision. It is sufficient for our present purpose to notice that the evidence was excluded, and that there was thus *excluded* in a civil cause evidence which might have proved the innocence of two persons charged with a grave offence, and that, too, the very same evidence as is constantly *admitted* in a criminal trial to prove the guilt of the accused.

The exclusion of evidence on any of the grounds to which we have adverted is erroneous in principle, and can scarcely fail to lead to practical injustice. After what has already been done towards the abolition of exclusive rules of evidence, we would hope that some more sweeping measures will yet be carried into law. But even though the rules of evidence should remain as they at present stand, it is at least desirable that they be applied with an undeviating consistency. We must not have rules enforced in the Court of Justiciary which are disregarded in the Court of Session, nor evidence of a certain character admitted in one case as proof of guilt, which in another is excluded when tendered in proof of innocence. The true principle is, that all *relevant* evidence ought to be admitted, leaving the question of its weight and sufficiency to be determined by the judicature before whom it is adduced.

## NOTES IN THE INNER HOUSE.

## SECOND DIVISION.

*Harvey v. Harvey.*

THE nature and extent of the paternal authority over children in minority, formed the subject of a carefully-considered and important decision of the Second Division, on the 15th June, in the case reported at the time under the name of "A. B., petitioner, for the custody of, and for access to, his children." The petitioner having, with singular taste, chosen to disclose his name—which most persons in the same circumstances would have carefully concealed—in letters to the public journals, it would be a useless delicacy to refer to the case under any but its proper style, *Harvey v. Harvey*. The facts of the case are so clearly and succinctly stated in the opinion of the Lord Justice-Clerk (of which the leading passages are extracted in our Digest of Cases, on page 382), that it is scarcely necessary for us to recapitulate them here. The petitioner seeks to have the custody of his children—who are fifteen and fourteen years of age respectively, and have been resident for twelve years with their maternal grandfather—restored to him by the Court. The children and their curator *ad litem* oppose this demand. The children express great repugnance to the society of their father, who was divorced in 1848 for being, in the words of the Lord Justice-Clerk, "guilty of the capital crime of incest" with his wife's sister, and who, in 1854, made proposals of marriage to her. The petitioner contends, that he has by law an absolute and uncontrollable right to regulate the place of residence of his children, and to require them to remain under his personal custody and care, unless it can be shown that this is clearly inconsistent with their personal safety, or would be clearly productive of moral contamination; neither of which, he maintained, would be the result of his obtaining their custody, the events alluded to having taken place many years ago. The Lord Justice-Clerk, in delivering the judgment of the Court, drew a clear distinction between the power of a father over children in pupillarity, rightly termed a right of dominion, and the much more feeble authority that he possesses over *minores puberes*, which may, according to Stair, come to an end by the children's marriage, or their being allowed to engage in an independent occupation, or by

the parents treating them in an unnatural manner, or acquiescing in their living apart.

The principles laid down in the four leading propositions of the Lord Justice-Clerk's opinion are of a broad and important character; but several practical questions will still remain open. The Court, in refusing the prayer of the present petition, were evidently actuated by three separate considerations. First, the previous misconduct of the father—his adultery with his wife's sister, twelve or thirteen years ago, and his proposals to her in 1848—demonstrated a laxity, or rather total want of principle on his part; and thus, when taken into consideration along with his own letters, which displayed an utter unconsciousness of the enormity of his conduct, rendered it probable that his children, if handed over to him, would be exposed to moral contamination. In the second place, the fact that the father had relinquished, for so many years, the care and custody of his children to others, was a strong reason for non-compliance with his present demand. Thirdly, the strong aversion of the children to hold any intercourse with their father, was, under the principles above laid down, a very forcible reason for refusing the petition.

It thus appears that the case was a peculiarly strong one; and the combination of so many elements enabled the Court to refuse the petition without any difficulty. But what would have been the result if either of the three had stood alone? For instance, what amount of misconduct on the part of a father will justify the Court in refusing his prayer for the custody of his children? As the object of the Court is not the punishment of the father, but the protection of the children, past acts are chiefly to be looked at in so far as they afford an augury for the future. The petitioner might have committed adultery thirteen years before, and might have long since repented, and might even have become a bright and shining light in the eyes of some religious body. In such a case, the Court would probably hesitate before they deprived a father of children who had willingly remained in his custody. In the present case, the adultery was aggravated by the relationship existing between the petitioner and the person with whom the adultery was committed, making the act a "great family crime;" although, as his counsel argued, his residence in colonies, some of which had passed, or were passing, a bill for the legalization of marriages with a deceased wife's sister, to which those with a divorced wife's sister

were analogous, must be taken into consideration. Perhaps the circumstance most unfavourable to the petitioner of all, was the fact, that his own letters revealed an utter obliquity of moral view, and a confusion of right with wrong, showing that he was an unfit person for the guardianship of children. The English case of *Wellesley* was one in which, not acts of former years, but vicious and improper treatment of the children at the time, formed the ground on which the Court took away from a father his children. He had taken into his head the strange fancy of doing carefully what others do by neglect, and of making his sons capable of acting as blackguards of the first water. He brought the lowest of the low to associate with them, and systematically instructed them how to use the most gross and profane language, with the avowed intention of making them undistinguishable in manners and conduct from their companions. Such conduct the Court held to be sufficient grounds for removing the children from a father who was hurrying them to utter ruin.

It is probable, therefore, that even without the two remaining considerations, the Court would have refused the present petition. On the other hand, if the two latter had existed without the first, the same result would probably have taken place—the protracted relinquishment of the paternal authority being a bar to its resumption, contrary to the will of the children. The third, however, if it had stood alone, would probably have not sufficed for a rejection of the petition. The feelings and wishes of a child during puberty are “entitled to weight;” but still, for its own sake, the father retains a certain amount of power; and if there be on his part neither misconduct nor abandonment, the parental control cannot legally be defied.

*Hugh Mackenzie, Petitioner.*

The necessity of a new Act for the further amendment of the law of entail was forcibly exemplified by the circumstances of this case. The petitioner is the heir of entail in possession of the large estate of Dundonell, in the west of Ross-shire, adjoining the coast, and containing a population of no less than 1500 persons. Till 1848 there was hardly a road on the property. The link that bound this isolated community to the rest of the civilized world was an uncertain water communication with Ullapool, always difficult, and often, in winter, impracticable. In the famine year, 1848, the

Highland Destitution Committee, desirous of combining the construction of important and permanent public works with the relief granted out of their funds, offered to many of the proprietors in the Highlands to pay half the expense of roads, etc., on their properties, if they engaged to bear the other half. Mr Hugh Mackenzie of Dundonell entered heartily into this plan; and on this footing an excellent road was constructed through his estate, forming a part of a road running parallel to the coast, and joining the two main roads from Dingwall to the western coast of Ross-shire. Mr Mackenzie's share of the expense, including that incurred on a portion of the road constructed on the estate of a neighbour, Mr Davidson of Tulloch, was L.3600. This sum he now sought to lay as a burden on the entailed estate of Dundonell, under the provisions of the Montgomery and Entail Amendment Acts. The former Act, while providing that a proprietor of an entailed estate may burden it to a certain extent, for money laid out in "enclosing, planting, or draining, or in erecting farm-houses, or offices, or outbuildings for the same, for the improvement of his lands and heritages," says nothing about roads. The Entail Amendment Act, however, sec. 20, enacts, that "private roads which shall from and after the first day of August 1848 be made through any entailed estate, or by way of immediate access thereto, may be deemed to be improvements falling under" the Montgomery Act. The petitioner contends that the several portions of road constructed by him are roads falling under the Entail Amendment Act. The roads in question having been made by the petitioner for the use of himself and his tenants, and being maintained at his expense, were not, in the proper sense of the word, public roads; they must therefore be held to be private roads in the sense of the Act. To this it was replied on behalf of the curator *ad litem* for the minor heirs of entail, that the roads in question were in reality public roads; that they were avowedly constructed as such, partly out of public funds; that they formed a line of communication between two public *termini*; and that the public had, to a certain degree, a vested interest in them. Besides, certain portions of road, of which the expense was now sought to be laid on the entailed estate, were entirely outside of its boundaries, and could not properly be held to form "an immediate access" to it at all.

The Lord Justice-Clerk, in delivering the judgment of the Court refusing the petition, expressed his regret that the very fact that Mr Mackenzie's intentions, in the formation of the road, were



patriotic and public-spirited, told against him in the present case. The improvements contemplated in the Montgomery Act were all of a selfish nature. In opening up the fastnesses of Western Ross (which, in a Report to the Destitution Committee, Captain Elliot had termed the last haunt of barbarism in Scotland), and bringing them within the pale of civilization, Mr Mackenzie was doing an excellent deed, but one about which there was nothing in the Montgomery or Entail Amendment Acts. He had evidently constructed these roads in the belief that he was undertaking a great and important enterprise for the public benefit; and he could not, therefore, claim the privilege of charging them on the entailed estate under the Montgomery Act.

The judgment of the Court is obviously in accordance with the spirit and letter of the Montgomery Act. The case, however, clearly shows that a new bill, to remedy the defects of former Acts, is imperatively called for. The Montgomery Act is a narrow, short-sighted enactment: it looks no further than the immediate and direct benefit of the entailed estate. A road such as the road in question, or even a regular turnpike road, might be of immense advantage, ultimately, to an entailed estate. The land, and the produce of the land, would become much more valuable; but, under the present law, because the improvement would benefit other people as well as the entailed proprietor, his hands are tied up. He can only make "selfish" improvements. Can it be seriously maintained that this is a fitting condition for our law to remain in?

The "road question" is merely one of many that ought to be settled by a new Bill. Several other important agricultural improvements, such as trenching, which were not included in the Montgomery Act, ought to find a place in the new one; and we need hardly add, that the construction and improvement of labourers' houses ought to be placed on at least as favourable a footing as the erection of dog-kennels. This subject has been brought before Parliament by Mr Ewart, and passed through committee. We trust his Bill will receive fairer treatment than the measure which Mr Dunlop was forced to abandon by the last Parliament; for, though there are landlords who do not scruple to sacrifice the peasantry to the "pheasantry," we cannot believe that a generation which places accommodation for pointers in the category of "necessary improvements," will tolerate the insulting distinction which degrades the serf below the level of the hound.

## LAW PERIODICALS.

## AUTHORITY OF COUNSEL.

THE recent decision of the Court of Exchequer on the motion for a new trial in *causa Swinfen v. Lord Chelmsford*, has been received with very different feelings by the public and the legal profession. By the former it is regarded as a usurpation, on the part of the lawyers, of an immunity from the consequences of professional error. By the lawyers it is regarded as something too good to last,—one of those extraordinary gifts of fortune which it is not good to welcome too eagerly. The *Law Times* looks askance at it. We shall take occasion next month to express our views upon a case so important to the interests of the legal profession. The following article, from the periodical above mentioned, may be taken as a pretty fair reflection of the tone of professional opinion on this subject:—

At last the Court of Exchequer has given judgment in *Swinfen v. Lord Chelmsford*, of which a very full report will be found among the reports of to-day. It is a bold and startling judgment; for it goes to the full extent of declaring that a barrister acting *bonâ fide*, and with the honest intention of doing the best for his client, is not liable for doing the very thing which his client has forbidden him to do. We are staggered by the proposition, but bow to it pending the appeal for which Mr Kennedy has obtained leave, and which it is to be hoped nothing will prevent from being brought. It is impossible to acquiesce in such a state of law, until it has received the highest judicial sanction; and when this has been obtained, we trust that the Legislature will think it right to interfere.

The facts are familiar to most of our readers, and therefore we need not state them at length. The action was brought against Lord Chelmsford for having wrongfully and fraudulently, without the authority, and against the instructions of Mrs Swinfen, compromised an action in which she was a plaintiff on an issue of *devisavit vel non*, directed by the Master of the Rolls; and the alleged special damage was, that she had lost the advantage of having the issue thereon tried and determined by the jury, and that she had been put to various expenses in consequence. Of course the alleged fraud was technical nonsense; but the grave and real question was, whether counsel may *bonâ fide*, and with the best intentions, do the very thing which his client tells him not to do. The Court of Exchequer has decided that he may. The Chief Baron, in delivering the judgment of the Court, says: "No action will lie against counsel for any act done honestly in the conduct or management of the cause. . . . We have assumed, for the purpose of giving judgment, that no authority in fact was given to the defendant to make any compromise, and even that contrary instructions may have been given, and that the defendant was aware of this. It is not, however, to be understood that we have formed, or that we express any opinion either way. If the defendant, under the circumstances we have assumed, be not liable to this action, as we think he is not, he would *à fortiori* not be answerable if he had authority, or had reasonable ground for believing that he had, and was not acting contrary to express or implied instruction." It is to be observed that it seems from these sentences, which contain the substance of the judgment of the Court, that their view rested on the ground that fraud in fact, as well as fraud in law, had not been found against the defendant:

that notwithstanding the special instructions of which the defendant knew, he did not know, or may not have known, that he did wrong in disregarding them. In other words, he was *splendide mendax*, and nobly broke his faith for his client's good. Perhaps the practical distinction is imperceptible between wilful faithlessness for a person's good, and the same for his disadvantage. There seems, however, to have been some reservation in the minds of some of the members of the Court; for, although they are said to have agreed in making the *bonâ fides* the test of the plaintiff's right to recover, the Chief Baron announced that his view went somewhat further than that of his colleagues, and that if counsel, in spite of instructions to the contrary, enter into a compromise, believing that it is the best course to take, and that the interests of his client require it, this is but an indiscretion, or an error of judgment, if done honestly, "and that no action can be maintained against him." His Lordship added, that the late Baron Watson concurred with him in this view.

We observe our usual rule, and do not presume to criticize this law; but we may express our regret that it is so. It clashes with the fundamental principle, that even a bailee for gratuitous consideration is liable for culpable negligence in the discharge of a duty which he has voluntarily assumed: for the assumption of the office is the sufficient source of a duty to discharge it with due care (*Coggs v. Bernard*, 1 Smith L. C. and notes). *Swinfen v. Lord Chelmsford*, although it does not clash with *Fray v. Voules*, 28 L. J. 232, Q. B., is yet painfully opposed to it in a fundamental point of view; for in *Fray v. Voules*, it was held that an attorney who compromises an action against the express directions of the client, is liable to an action for damages to the client—since the client and not the attorney is *dominus litis*; and it may be remarked that this liability of the attorney was ruled by Crompton, J., to arise in tort as well as on contract; the former of which cases might have been thought to apply as much to the relation of counsel and client as to that of attorney and client. Certainly, if a new argument were required for the abolition of the absurd rule which makes an attorney liable to his client for negligence, while counsel is not liable for negligence either to attorney or client, the case of *Swinfen v. Lord Chelmsford* supplies such an argument fully. If the theory of the fictitious *honorarium* which counsel receives be the basis of the practice by which he is held to owe no duty to his client, it is a theory which is at once absurd and pernicious. If a client cannot control his own counsel, it were better perhaps that he should be without counsel. At least it is an iniquity that a suitor should be compelled either to become his own advocate, or to employ an advocate who may do, to the real or fancied prejudice of the suitor, the very thing which of all others he has been instructed not to do.

#### PRISONERS' COUNSEL BILL.

(From the Law Times.)

Mr Denman has introduced a Bill that will greatly improve the administration of criminal justice. It is designed to remedy a defect often pointed out in these pages, which gives to the prosecution the reply, and thus deters prudent advocates from calling witnesses for the defence, if he can possibly avoid it. The consequence was seen in Mr Hatch's case. Every practitioner in the criminal courts has experienced the difficulty of choice between the certain danger of a reply, and the lesser danger of depriving the Court of the testimony of the prisoner's witnesses. If it be sometimes dangerous not to call witnesses, it is often destruction to call them. The practical result of this existing practice is to exclude the prisoner's answer, and to rest his chances of acquittal on the weakness of the case for the prosecution.

Nevertheless, the Bill, though an undoubted improvement, does not all that is required. To the prosecution is still left the reply, and that will go far to neutralize the benefits of a summing-up. Still the advocate will feel the danger

of calling witnesses where the last word is with the prosecution. After all, is not the Scotch practice the most convenient, as it certainly is the most just and reasonable?

There the evidence on both sides is heard without an opening speech, and then the prosecution addresses the jury upon the whole case as actually proved, and is followed by the prisoner's counsel in answer to him. An opening speech has some advantages, but it is also attended with some danger of injustice, for the statements are not always proved, yet they have made an impression upon the minds of the jury which the subsequent failure of proof does not always remove. They are apt to remember the whole story so neatly and plausibly put together by the prosecution in a narrative, and not to discover afterwards to what an extent gaps in the evidence were supplied by the *brief*.

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### THE MONTH.

*The Bench and the Bar.*—In a journal devoted to the interests of the profession, it would be unpardonable if we failed to take notice of those collisions which occur, happily not very often, betwixt the Bench and the Bar. An unpleasant case of this nature has lately been brought under our notice; and that we may not do injustice to the parties, we prefix a report of the occurrence, taken from the columns of the *Dundee Advertiser* of 15th ult.,—premising, that the scene occurred at a trial for culpable homicide in the Sheriff Court of Fifeshire, and that the interlocutors are Sheriff Monteith and Mr Gunn, a very respectable practitioner in Cupar.

Dr James Mackie was next examined, who deposed as follows—I saw deceased lying at Mr Hutton's back-door. She was dead. There was a mark on the nose, and blood had flowed from the wound. I, along with Dr Bonnar, made a *post-mortem* examination of the body, but I observed no other marks. The joint report of Dr Mackie and Dr Bonnar being handed up, witness read it. The document described that there was found to be a small effusion of blood on the surface of the brain, and that the lungs, heart, and other internal organs were perfectly sound. The medical gentlemen were of opinion that death was caused by effusion of blood on the brain and lateral ventricles. The witness's examination proceeded as follows:—A blow or blows on the head from the fist would produce death in this way. A fall on the causeway on a person's bottom might produce concussion of the brain also. My opinion is, that the effusion of blood on her brain arose from injuries, not apoplexy. I have heard the evidence to-day, and I think what I have heard is sufficient to cause instantaneous death.

Cross-examined by Mr GUNN.—Extravasation of blood on the brain might be produced by rupture of blood-vessels as well as by concussion. Such ruptures might arise from disease, softening, or any other disease in the vessels. Intoxication may rupture the blood-vessels, but in this case it did not. My reason for saying so is the large extent of surface on which there was effused blood, the situation of the blood, the absence of the odour of alcohol on the brain, and there being no congestion, an invariable effect of poisoning by alcohol.

The SHERIFF.—*I have very great doubts, Mr Gunn, whether your proceedings in this line of examination are the best for the interests of your client.*

Mr GUNN.—I will just, my Lord, bring out another thought. Witness in

further cross-examination said,—There cannot be congestion of the ruptured blood-vessels, but there may be congestion in one and rupture in another. I found a slight smell of alcohol in the stomach. [Shown a passage in Dr Taylor's *Medical Jurisprudence*, where that authority said it was impossible to distinguish between death by intoxication and concussion of the brain]—Dr Mackie said that in this case there was extravasation of blood, so that it was different from the case referred to by Dr Taylor. A blow may cause concussion of the brain. I say nothing opposite to Dr Taylor.

*The Sheriff again warned Mr Gunn that his line of cross-examination was really tending to the injury of his client.*

The Witness proceeded—The symptoms of apoplexy are slight effusion of blood in the substance and not on the surface of the brain, and generally occurring in a person above fifty years of age. There was no appearance of disease in the blood-vessels of the brain. Mr Gunn then caused the doctor to read a passage from a work, the name of which we did not catch, but which was characterized by Dr Mackie as an old and obsolete work. The passage said that many persons had been unjustly convicted of murder who had died of passion. The doctor said he could not tell whether the extravasation of blood was caused by a blow or the fall.

*The Sheriff said he was really bound to protect the prisoner against the injurious proceedings of his agent. He thought that this cross-examination was doing more harm to the prisoner than anything else which had occurred in the trial.*

Mr GUNN said he was sorry his Lordship thought so, and went on to cross-examine Dr Mackie, who deposed—It was both venous and arterial blood. In the case of apoplexy, the rupture generally takes place in the arteries. Sometimes violent concussions rupture the brain, and sometimes not.

The remarks which appear to us to call for observation, are those which we have printed in italics. Although very simple in their nature, and not offensive in language, they involve, by implication, three very serious propositions, affecting not only the privileges of the Bar, but the method of the administration of criminal justice. Were it necessary to express any opinion on the merits of the altercation, we would confess, even at the risk of incurring the contempt of Sheriff Monteith, that we are totally unable to perceive how, or in what respect, the cross-examination of Mr Gunn was likely to be prejudicial to the interests of his client. By this candid avowal, we have doubtless already demonstrated to Mr Monteith the singular obtuseness of our editorial perception, and disarmed his mind of all resentment towards a critic so utterly incapable of weighing evidence, or of estimating the intensity of provocation which evoked the thunders of his judicial displeasure.

Assuming, however, that Mr Monteith was right in the view which he took of the evidence, his observations imply :—(1.) That when a judge “*has a doubt*” whether a particular line of examination—the relevancy of which is not disputed—tends to the benefit of the examining party, it is his duty immediately to announce such doubt, thereby interrupting the cross-examination, paralyzing the resolution of the examining barrister, and suggesting to the mind of

the witness that he is brought into Court to support a particular side, and that it may be consistent with the administration of justice to keep back part of the truth, and only to communicate such facts as may be "for the interests of the client." But Mr Monteith is not content with the intimation of a doubt. His criticism is not appreciated; at all events, the procurator proceeds with his examination. Mr Monteith knows full well that the prisoner's agent has made a precognition; that he has an object in view in the line of his examination; although the narrow rules of Scotch criminal procedure deprive him of the opportunity of stating that object, and absolutely preclude him from explaining his case to the jury before leading evidence in support of it. Yet, knowing all this, Mr Monteith thinks it consistent with his duty to "warn" the procurator that his line of examination is "tending to the injury of his client;" thereby asserting, in the next place,—(2.) That a judge is entitled to censure a barrister in open Court for putting questions relevant in themselves, the answers to which happen to be prejudicial to his client. This is summary jurisdiction with a vengeance. Might not the procurator, with equal propriety, warn the Sheriff, that his observations were detrimental to the interests of the public? The barrister is just as independent in his sphere as the judge is on the bench, and ought to be equally secure from the apprehension of being addressed in the language of menace or of warning. By the common law of the United Kingdom, every barrister, whether in the Superior or Inferior Courts, is vested with the right of conducting his client's case in the manner which he, in his own judgment, may believe to be conducive to his best interests. He cannot be compelled to disclose his reasons for any step, how unreasonable soever, which he may resolve to take; and, provided it is within the rules of law, his conduct is certainly not amenable to criticism from any quarter. It may be questioned how far the barrister is entitled to proceed without authority in the way of compromising an action; but nobody ever doubted (unless Mr Mackintosh's case can be considered as raising a doubt) as to his plenary powers in the *bona fide* conduct of the case, and least of all in so delicate a department of his duty as the examination of witnesses. He may and will occasionally make the case of his client worse by putting injudicious questions; but that is an evil resulting merely from the imperfection of all human agency, and for which

the law provides no remedy. A physician may kill his patients by improper treatment; a judge may misdecide a case from ignorance of the law. The danger is no greater or more irreparable in one case than the other, excepting in this one respect—that the judge is irremovable, while the professional gentleman, if he mismanages his business, will very soon have no business to mismanage.

One simple consideration will make manifest the overwhelming importance of the principle we have here laid down. Judges are very properly armed with the power of censuring or punishing the practitioner in a summary manner, when, in the course of his professional conduct, he has been guilty of a contempt or other illegal proceeding. From the exercise of this power the practitioner can sustain no injury in the estimation of the public, because every subject being presumed to know the law, he must be able to form an opinion of that conduct for which censure is awarded; and in particular, there is nothing more easy of apprehension than the meaning of disrespectful expressions, and the adequacy of the punishment awarded in respect of them.

But is it possible that public opinion can be any protection to a barrister, when he is told by a judge that his examination of a scientific witness is adverse to the interests of his client? The laity are bound to know as much of the law as is necessary for their own guidance; but they are not bound to be judges of the value of evidence or the theory of cross-examination. They will, therefore, most naturally assume that the judge is in the right, and the counsel in the wrong. Give the judge the power of commenting unfavourably on the professional skill displayed by the practitioner in Court, and we sacrifice the independence of the Bar, and furnish the Bench with an engine of oppression, which an unscrupulous person may use with fatal certainty, to injure and destroy the reputation of any member who may be personally obnoxious to him.

(3.) The third proposition to which we have alluded as having been laid down by Mr Monteith is, that it is the duty of the judge to interpose to prevent unfavourable evidence reaching the jury, in order "*to protect the prisoner.*" This is certainly a novel view of the duty of the presiding judge at a jury trial. We had always imagined it was the business of that functionary to bring out *the whole truth*; and that, if he had reason to suspect the existence of any unexplored vein of evidence, it was his duty to bring it to light, although both parties might be endeavouring to keep it out of view.

Of course, if a barrister insists on bringing out something which is not evidence, it will be the duty of the judge to stop the examination, whether the statement is, or is not favourable to the prisoner. But Mr Monteith has so tender a regard for the interests of the panel, that he will not even tolerate evidence which is legal and admissible in itself, merely because it happens to be brought out by the examining barrister of the party against whose interests it is supposed to militate. This certainly savours too much of scholastic refinement. The true principle (and we wish it were always kept in mind by those whose duty it concerns) is, that the judge has but one question to consider during the progress of the examination,—*Is this evidence?* If it is evidence, it becomes immediately the property of both parties; and it is perfectly immaterial, at that stage of the case, to inquire by which party it was brought out, although there are occasions in which the judge may, *in summing up*, be justified in observing to a jury, that particular facts were brought out by the counsel for one of the parties as a part of his case.

The magnitude of the considerations involved in the incident to which we refer, has induced us to comment upon its bearings at greater length than the importance of the case would seem to justify. We have not the slightest intention of reflecting unfavourably on the conduct of Mr Monteith, who was evidently actuated by nothing else than a sense of duty, and who may plead, in extenuation of the course he took, the example set him by some of the judges in a superior tribunal, which it is his duty periodically to attend. One or two of those very learned gentlemen—from what motive we are not aware, but possibly with the view of exemplifying that retrospective wisdom which is said to be a prominent feature of the Scottish character—are in the habit of indulging in unpleasant remarks, in the presence of witnesses, whenever anything is elicited that is calculated in the remotest degree to prejudice the case of the examining counsel. On the justice of such treatment, the profession may safely be left to pronounce an opinion; for the present, we are content with exhibiting its illegality. The Act of Sederunt regulating civil trials, declares that counsel shall be at liberty to proceed with the examination of witnesses *without interruption from any quarter*,—a phrase which was introduced for the very purpose of meeting the case of interruption by the judge. But the common law is quite broad enough to secure the same privilege to advocates in the criminal courts, whether supreme or inferior. The



remedy is easy. All that is necessary is a firm and temperate assertion of the irresponsibility of the advocate, and a denial of the judge's right to interfere. We would not be understood as seeking to throw the slightest obstacle in the way of that courteous interchange of inquiry and suggestion between the Bench and the Bar, which is so useful in facilitating the transaction of business. There are many occasions, too, when even the experienced advocate—and how much more the untrained junior—may have reason to be grateful for suggestions made to him, in an unobtrusive manner, in the course of an argument or cross-examination. But other feelings are awakened when suggestion takes the form of dictation, and advice degenerates into sarcasm or reproof. In such a case, the course we have recommended appears to be the only one consistent with the maintenance of the privileges of the profession.

*The Marriage Law Amendment Bill.*—This measure, which has not received from the general public that attention which its importance deserves, has been freely canvassed in legal circles. The Faculty of Advocates has issued an elaborate report on the subject, replete with valuable criticism, and containing many useful suggestions for amendment. We understand that the provisions of the Bill relating to Consistorial practice were amongst those which gave rise to the greatest amount of discussion in that body; the leading questions being those relating to the jurisdiction of the Court, and the method of taking proof. We are glad to learn, that the suggestion on this topic which we made in our last Number has met with the unanimous approval of the Faculty,—that body having agreed to recommend the insertion of a clause abolishing the anomalous functions of the Sheriffs Commissaries in the taking of proofs, and requiring the Lord Ordinary, “where a proof is allowed,” to take the evidence in all such cases before himself without a jury. If this clause be adopted, it will still be competent to try such cases by jury under the provisions of the Judicature Act. While adhering to the opinion already expressed in these pages, that jury trial is preferable, even in divorce cases, to the system of leading evidence before a commissioner, we have no hesitation in saying that trial before a judge, without a jury, is in many respects the preferable mode of procedure; nor do we apprehend that trial by jury will be resorted to, except in those exceptional cases of divorce which raise a pure issue of conflicting evidence. In connection with this new feature of the Bill, a question has been raised

as to the expediency of having the evidence taken down by a shorthand writer. The advantages of that method of recording evidence are chiefly apparent, in the event of the case being taken to review in another Court; and as it is contemplated the Inner House should retain the power of reviewing the Lord Ordinary's decision upon the evidence, there is a certain inducement to try the experiment in this limited class of cases. But we confess we look with apprehension to the spread of a system which is intended to relieve the judge of the labour of taking notes of the evidence laid before him,—a labour which, however irksome, is at least the means of securing attention to the business in hand, and which, we hope, would still be continued from a sense of duty, even though shorthand reporters were engaged. Besides, a judge has many facilities for making a substantially accurate record, that are denied to the reporter. He may make the witness repeat his statement; he may correct verbal inaccuracies; and may condense a rambling, confused, and as spoken utterly unintelligible, statement into readable English; and if there be any doubt as to the meaning of an important statement, he will take care to have the accuracy of his note confirmed by the witness or examining counsel. A reporter, however, must be content to enact a purely passive part in the trial; and we question whether that which we should gain in fulness from his notes would not be more than compensated by the want of substantial accuracy. The clause defining jurisdiction, as proposed by the Faculty, is not materially different from that in the original Bill, as printed in our last impression. We think it would have been better had the framers adhered to domicile, pure and simple, as the sole ground of jurisdiction, without attempting to define it, and without multiplying the grounds of jurisdiction. We observe it is proposed to make the *locus delicti*, together with personal citation, available as a ground of jurisdiction. This has never yet been sanctioned by the House of Lords; and although some of the later decisions of the Court of Session have gone a considerable length in support of the doctrine, it is opposed by the authority of Lord Redesdale (in the case of *Tovey v. Lindsay*), and of that eminent consistorial lawyer, Mr Ferguson, both of whom were of opinion that jurisdiction *ratione delicti* was only properly applicable to the proceedings of courts of criminal judicature.

*Fees in Jury Trials.*—The question has often been asked, why jury trial is so unpopular in Scotland, and how it is that so many

ingenious schemes are resorted to for the purpose of escaping the ordeal of a trial of the facts of the case. We believe the whole difficulty lies in the expense. In England the compensation paid to jurors is merely nominal, and counsel are content with the same fees which they would expect for conducting an important argument in Court. The system is different in Scotland, and we suspect that the large fees paid to jurymen and jury-counsel, rather tend to encourage a system of extravagance throughout the arrangements for such cases. While every one acknowledges the absurdity of the distinction which is made in the scale of payment for jury and other cases, it is not to be expected that any improvement can be effected so long as the matter is left to the discretion of individual agents. We rather think, however, that the auditor of Court, with the sanction of the Bench, might lay down a maximum scale of fees for each day's employment of senior and junior counsel in jury cases, as is done in taxing the bills of solicitors practising before Parliamentary committees in London. We understand the maximum charge allowed for committee practice, inclusive of consultation fees, is L.12, 12s. a day—a very adequate scale, we venture to think, for our own courts. Of course it would still be competent, as it is in St Stephen's, to give additional retaining fees to leading counsel, but such extra remuneration should not be allowed as a charge against the opposite party.

## Correspondence.

### STAMPS IN MORTIS CAUSA DISPOSITIONS.

*To the Editor of the Journal of Jurisprudence.*

April 23, 1860.

SIR,—I observed in the pages of your excellent Journal some months ago, a discussion on the subject of the stamp duty affecting wills. The recent Stamp Act, 23 Vict., cap. 15, contains the following clause, sec. 7: "Whereas it is considered that certain testamentary dispositions in Scotland are chargeable with stamp duty, and it is expedient that the same should be exempted: Be it enacted, that no will, testament, testamentary instrument, or disposition, *mortis causa*, shall be chargeable with any stamp duty." Previous Stamp Acts contained a similar exemption, notwithstanding which the profession invariably, I believe, used a 35s. stamp for dispositions, *mortis causa*, conveying heritage. As I understand, doubts are still entertained whether such dispositions are now exempt under the new Act, the following letter, which has been received from Mr Fletcher, Comptroller of Inland Revenue, in answer to a communication addressed to him on the subject, may dispel these doubts:—"Inland Revenue.

*Edinburgh, 13th April 1860.*—Sir,—In reply to your letter of the 12th instant, I am to acquaint you, that a disposition, *mortis causa*, by which heritable property is conveyed, is not chargeable with any stamp duty. See 23 Vict., cap. 15, sec. 7.—I am," etc.

I need not comment on the propriety of the exemption, or on the wisdom of the policy which dictated it.—I am, Sir, your most obedient servant,

EX LEGE.

## Legal Intelligence.

**INTRANTS.**—On the 15th May, Mr L. Mackersy was admitted a member of the Society of Writers to the Signet. On the 31st May, Messrs R. J. Robertson, J. T. Simson, and James Hunt, were admitted to the same body. The following gentlemen were called to the bar on the 5th June:—Mr Alexander Blair, Mr Robert Maclean, and Mr Hubert Hamilton.

**JURY TRIALS.**—The summer session of the Court terminating on the 20th July, the sittings of the First Division for the trial of causes by jury are appointed to commence on Saturday, 21st July, and of the Second Division on Monday the 23d.

**THE ABERDEEN COLLEGES.**—The Privy Council met on Wednesday, 13th ult.—present: Earl Granville, President; the Lord Chancellor, the Right Hon. W. E. Gladstone, the Right Hon. S. H. Walpole, Lord Justice J. L. Knight Bruce, the Right Hon. Sir E. Ryan, the Right Hon. R. Lowe, and the Right Hon. Sir J. Graham—to hear an appeal by the Lord Provost, Magistrates, and Town Council of the city of Aberdeen, the Senatus of Marischal College, and of other public bodies, against certain ordinances of the Commissioners appointed by the Universities (Scotland) Act of 1858. The appeal was partly heard, when their Lordships adjourned till next day. Mr Roundell Palmer, Q.C., and Mr Forsyth, Q.C., were for the appellants; and Sir H. Cairns, Q.C., and Mr Macpherson, Advocate, appeared to support the ordinances. At the adjourned judicial meeting on Thursday, their Lordships, after hearing Sir Hugh Cairns conclude his argument in support of the ordinances of the University Commission, and Mr Roundell Palmer, Q.C., in reply, took time to consider the case.

**SHERDDEN v. PATRICK.**—In the Court of Probate last week, in the case of *Shedden and Shedden v. the Attorney-General and Patrick*, Mr Macaulay, Q.C., moved that the commission which had been returned from Scotland with the examination and cross-examination of Mr Patrick, one of the respondents, might be reopened and another commission issued for his further examination and cross-examination. The ground of the application was, that Miss Shedden was absent in America at the time of the last examination, that she had now returned, and that she had in her possession various documents having an important bearing upon the case, with respect to which it was desirable to cross-examine Mr Patrick. Dr Deane, Q.C., opposed the motion, on the ground that its only object was delay, and that the documents which had been brought back from America had all been in print for years, and might have been used at the last examination. His Lordship said he thought it was just that a further examination should take place, and ordered another commission to be issued.

**WANT OF ACCOMMODATION IN THE COURTS OF LAW.**—The following sketch, which we extract from the *Law Times*, reveals a state of things at least as unseemly as anything that has been related regarding the mode of conducting the sittings in the Sheriff Courts of Scotland:—Westminster, June 21.—This was one of the days appointed for the sittings in banco, after term, but for some

time it was impossible to discover where the said court in banco was to be found. At length it was ascertained that their Lordships had determined to sit *in camerâ*, in their private robing-room. This was rendered necessary by the absolute want of other accommodation; for, though millions have been squandered in the erection of the new Palace at Westminster, it seems never to have occurred to the minds of certain parties that "the superior courts of law" are entitled to any consideration. There being no help for it, if the court was to sit in banco at all to dispose of the arrears, their Lordships, with great consideration for the public interest, consented to sit in their private dressing-room. It was, indeed, necessary to resort to the highly unconstitutional and illegal course of excluding the general public, and those persons only were admitted whose attendance was required in the case before the court. The suitors in waiting had to stand outside. Having been admitted to their Lordships' *sanctum*, we are sorry to state that the accommodation provided by this great country for the convenience of her Majesty's judges is anything but what might have been expected. We found three of the puisne judges, arrayed in scarlet, sitting at a small round table, with just room enough for an inkstand in the centre; three masters were screwed up in a corner against a wall; and in the immediate vicinity of their Lordships there was a small sofa, a wooden bench, and two chairs, occupied by counsel. There being no other accommodation, one very daring reporter actually seated himself on Mr Justice Wightman's great wig-box, and placed his inkstand on the mantelpiece; and at a later period of the day, emboldened by the example, like the frogs in the fable, two other intruders ventured to sit down on two other wig-boxes, which stood conveniently nigh. All this time, in the New Palace, "furlongs" of committee-rooms were unoccupied and locked up.

**THE PROCLAMATION AGAINST VICE.**—The following proclamation, which appeared in the *London Gazette*, for the encouragement of piety and virtue, and for the preventing and punishing of vice, profaneness, and immorality, was on the 19th ult. read at the Cross of Edinburgh by the Heralds, with the usual formalities. The proclamation will be substituted for that which has been usually read at the Courts of Assize in England before the judges commence business:—Victoria R.—We, most seriously and religiously considering that it is our indispensable duty to be careful above all other things to preserve and advance the honour and service of Almighty God, and to discourage and suppress all vice, profaneness, debauchery, and immorality, which are so highly displeasing to God, and so great a reproach to our religion and Government; to the intent, therefore, that religion, piety, and good manners may flourish and increase under our Administration and Government, we have thought fit, by the advice of our Privy Council, to issue this our royal proclamation, and do hereby declare our Royal purpose and resolution to discountenance and punish all manner of vice, profaneness, and immorality in all persons of whatsoever degree or quality within this our realm; and we do expect and require that all persons of honour, or in place of authority, will give good example by their own virtue and piety, and to their utmost to contribute to the discountenancing persons of dissolute and immoral lives; and we do hereby strictly enjoin and prohibit all our loving subjects, of what degree or quality soever, from playing, on the Lord's day, at dice, cards, or any other game whatsoever, either in public or private houses, or other place or places whatsoever; and we do hereby require and command them, and every of them, decently and reverently to attend the worship of God on every Lord's day. Our further pleasure is, and we do hereby strictly charge and command all our judges, mayors, sheriffs, justices of the peace, and all other our officers and ministers, both ecclesiastical and civil, and all other our subjects whom it may concern, to be very vigilant and strict in the discovery and the effectual prosecution and punishment of all persons who shall be guilty of dissolute, immoral, or disorderly practices; and that they take care also effectually to suppress all public gaming-houses and places, and low and other disorderly houses; and also to suppress and prevent all gaming whatsoever.

in public or private houses, on the Lord's day; and likewise that they take effectual care to prevent all persons keeping taverns, or other public houses whatsoever, from selling wine, beer, or other liquors, or receiving or permitting guests to be or remain in such their houses in the time of Divine service on the Lord's day. And for the more effectual proceeding herein, we do hereby direct and command all our judges of assize and justices of the peace to give strict charges at their respective assizes and sessions for the due prosecution and punishment of all persons that shall presume to offend in any of the kinds aforesaid; and also of all persons that, contrary to their duty, shall be remiss or negligent in putting the said laws into execution; and that they do at their respective assizes and quarter sessions of the peace cause this our Royal Proclamation to be publicly read in open court immediately before the charge is given. Given at our Court at Buckingham Palace this 9th day of June 1860. GOD SAVE THE QUEEN.

**THE YELVERTON MARRIAGE CASE.**—In the Dublin Court of Common Pleas, in the case of *Grant v. Yelverton*, an application was made on the part of the defendant that an action should be stayed until the decision of certain legal proceedings now pending in Scotland. It appeared the action was for recovery of L.27 on account of goods sold and delivered to the Hon. Maria Theresa Yelverton, otherwise Longworth, the alleged wife of the defendant, the Hon. Major William Charles Yelverton, an officer in the army, at present quartered in Cork. Major Yelverton's affidavit stated that he was legally married, according to the ceremony of the Established Church, to Mrs Forbes, the widow of the late Professor Forbes, and that he never had been legally married to Miss Longworth, although he cohabited with her for some time. The Court finally refused the motion to stay the proceedings, and on the 22d June the defences was abandoned, and decree allowed to go by default.

**BOX-DAYS.**—*Edinburgh*, 27th June 1860.—The Lords appoint Wednesday the 17th, and Wednesday the 31st, of October, to be the Box-days in the ensuing vacation.

(Signed) DUN. M'NEILL, *I.P.D.*

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## Digest of Decisions.

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### COURT OF SESSION.

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#### FIRST DIVISION.

**DONALD v. DONALD.**—*May 26.*

*Aliment—Arrears—Amendment of Libel.*

This was an action of aliment by a wife against her husband. The parties had agreed by joint minute that future aliment should be fixed at the sum of L.75 annually, and the point at issue affected merely the arrears claimed for a period of fifteen years from the date of the alleged

desertion on the part of the husband to the date of the claim. It was argued for the pursuer, that arrears of aliment were in all cases due. (*Macnaughton*, 12 D. 703; *Finlayson*, July 7, 1809, F.C.) Leave was also asked to give in a condescendence specifying debts, if such should be necessary. The defender, on the other hand, submitted that the nature of aliment excluded any such claim; that where debts were incurred by the wife, the husband was liable for such debts, and that he could not be called on to pay arrears of aliment, as he might still be required to pay the debts, to cover which such arrears had been granted. (*McFarlane*, June 6, 1844, 6 D. 84; *Lidlaw*, 2 Starkie, p. 86; *Henderson*, Hume, 202.) Lord President—In dealing with this question, we must assume the fact of desertion and the other statements of the pursuer, and not admit the allegations of the defender as to the pursuer's conduct during the alleged desertion. I cannot give decree to the pursuer. It is not stated that debts were incurred. The cases cited in favour of the pursuer are—*Macnaughton*, which was a judgment for payment of debts contracted to third parties; and *Finlayson*, which rests on different principles. That was an action of aliment by a mother against the father of a bastard child. She had paid for its entire maintenance, and was thus entitled to repayment of one-half from the father, he being a simple debtor to her in that amount. The question of aliment did not arise. The amendment of the summons I cannot agree to. It would be virtually permitting a new record.

*Susp.*, STEPHEN v. SKINNER.—May 31.

*Process—Suspension—Caution.*

Messrs Munro and Ross, writers in Stornoway, in Feb. 1857 obtained a decree in absence, in the Court of Session, against the suspender, for the sum of L.80, 14s. 5d., being the amount of certain alleged business accounts incurred by him to them. In March following, Munro and Ross assigned this decree to Mr Skinner, S.S.C., the charger, their Edinburgh correspondent; and by virtue of his assignation Mr Skinner applied for and obtained sequestration of the suspender's estate. Thereafter Mr Ross (one of the partners of Munro and Ross) was appointed trustee, and the charger acted for some time as sole commissioner. Since 1856, it is stated that the suspender was "abroad in the Chinese seas, in the course of his business as a mariner, till 1859, when he returned to this country." Stephen was charged on the said decree by the respondent, and he then raised the present suspension, on the ground that the debt was not due, which was the only one ranked in the sequestration. On the case coming into Court, it was intimated to Mr Ross, the trustee, who declined to sist himself, and the charger moved the Lord Ordinary (Mackenzie) to ordain the suspender to find caution for expenses, he being a sequestrated bankrupt. The Lord Ordinary refused the motion, and the respondent reclaimed. The respondent put in a minute to the effect, that if the suspender were ordained to find caution, he would not proceed to do personal diligence against him. Authorities for suspender:—*Clerk v. Ross*, 20th May 1813; *Taylor v. Fairlie's Trustees* (House of Lords), 1st March 1833. The Lord President said there was no doubt that, as a general rule, a sequestrated bankrupt pursuing an action was bound to find caution for expenses, while one defending an

action was not. The present case was a suspension, and no doubt it had been decided that in such a case the record was to be made up in the suspension, and not in the original action. Formally, therefore, the suspender was a pursuer, but the onus might soon shift. He was, therefore, in a somewhat equivocal position. It was said the minute removed the difficulty in the case; he (the Lord President) didn't think so. Upon the whole, and having regard to the fact that the trustee was the cedent of the respondent, he was against ordering the suspender to find caution. The other judges having concurred, the Court adhered.

INHABITANTS OF LOCHGELLY *v.* EARL OF MINTO.—June 1.

*Servitude—Res Publicæ.*

This was an action at the instance of certain inhabitants of Lochgelly, Fifeshire, for the purpose of vindicating certain alleged public rights over the common muir of Lochgelly, belonging to the Earl of Minto. Among these rights were a footpath across the muir, and the rights of holding public markets, quarrying stones, taking away clay, casting, winning, and taking away peat and divot, watering and drying lint, drying hay, holding public games and exhibitions, and of a playground for their children. In 1705 the Scottish Parliament gave to the authors of the Earl of Minto the right of holding fairs or markets at the town of Lochgelly. For long the markets have ceased to be held by the Earls; but it is stated that for upwards of forty years they have been held by the public on the common muir. It was further stated that the public uses sought to be vindicated had been exercised for upwards of forty years, but that they have now been excluded by the encroachments of the defender, unsuccessfully remonstrated against by the public. The defender denied that the rights claimed have ever existed; and further, that, if they had existed, the pursuers have any title to vindicate them, being only inhabitants of Lochgelly, and not feuars capable of acquiring such servitudes. The Lord Ordinary (Neaves) dismissed the action, refusing to allow an amendment of the summons in the conclusion as to the foot road, and holding that the pursuers had not set forth a sufficient title to insist in the other conclusions. The pursuers reclaimed. The Lord President—The interlocutor of the Lord Ordinary was quite right. With the exception of the conclusion as to the right of footpath, the action was laid on mistaken views of the law. These rights were claimed as public rights, and not as belonging to feuars or proprietors. But where was the authority for holding that there was such a thing as a public right of market? He was surprised at the difficulty there had been in expressing its character, for the difficulty was in the thing itself. The error in the conclusion as to the footpath might have been corrected on the usual conditions; but were it done, the summons would be so mutilated that it was far better to dismiss it at once. The other judges having concurred, the Court adhered.

TOD'S TRUSTEES *et al.* *v.* DAWSON *et al.*—June 5.

*Process—Diligence—Productions.*

This is one of the cases arising out of the alleged frauds of the Carron Company. The Lord Ordinary (Mackenzie) had made an order on the Carron Company to produce in Edinburgh, under the charge of the Clerk



of Court, 237 volumes of their ledgers, journals, etc., ranging over a period of half a century. These books are all at Carron, and it was strongly contended that their production in Edinburgh would occasion great inconvenience to the Company, who expressed their willingness to allow the pursuers the same access to the books which an accountant acting under an order of the Master of the Rolls in the similar actions depending in Chancery has had. For his convenience it was stated the Board-room of the Company had been fitted up with desks, and the books were open to him in it from four to five daily, without any supervision on the part of the Company. The Carron Company reclaimed. To the competency of the reclaiming note it was objected that it had been presented without the leave of the Lord Ordinary; though not disposing of a preliminary defence, or coming within any of the other excepted interlocutors pronounced during the making up of a record to a reclaiming note, against which it was not necessary to obtain the Lord Ordinary's consent. After a long discussion the objection was waived, and after another discussion the Court recalled the Lord Ordinary's interlocutor, on condition of the Carron Company allowing the pursuers all reasonable access to the books at Carron; but reserving to the pursuers to present another application in case there should be any obstruction to their inspection of the books.

RUTHERGLEN v. BEITH.—June 6.

*Agent and Client—Professional Remuneration.*

This was an action at the instance of Andrew Rutherglen, designing himself "accountant in Glasgow," against Mr John Beith, seed merchant, Rothsay, to obtain payment from him of an alleged balance of £183 of an account for what is said in the summons to be "professional business." A great part of the work sued for is correspondence, etc., in reference to various litigations in which the defender was engaged, the work being of a nature analogous to that performed by a country agent. The Lord Ordinary (Neaves) disallowed the charges in four of the accounts, as not containing "any charges for business done falling under the profession of an accountant." Argued in support of the reclaiming note:—Any one who does what may be called law-agents' work *out of Court* is entitled to remuneration, as his charges are not struck at by the fiscal law, on the authority of the case of the *Glasgow Police Commissioners*, February 14, 1837. Further, had Mr Beith been successful in his litigations, he would have been entitled to his expenses from the opposite party; and that being so, the question came to be whether the proper professional work of an accountant was so well defined as to prevent the pursuer from obtaining payment for the time and labour which he had expended on the defender's affairs. Answered;—*qua* accountant, the pursuer had no right to make these charges, and he was never employed by the defender to do any work of any kind, but volunteered his services as a friend.

The Court recalled the interlocutor of the Lord Ordinary *hoc statu*, and remitted to ascertain the question of fact as to employment.

INGLIS v. DOUGLAS, etc. (Western Bank Directors).—June 12.

*Process—Record—Second Revisal.*

In this case the Court, on 20th March last, holding that there was a want of sufficient specification and precision in the pursuer's averments

on record, ordered the record to be withdrawn and a new record made up. The pursuer lodged a new revised condescendence in obedience to this order on the box-day, and the defenders subsequently gave in their answers thereto. The pursuer now gave in a note to the Court, along with a new print of his revised condescendence, containing considerable alterations made since revised defences were lodged. The defenders, however, objected to the pursuer's new paper, on the ground that it was not an adjustment caused by new matter brought forward in the revised defences, but was a re-revisal of the condescendence, differing in several most important particulars from the statements which had been already answered by the defenders; and they maintained that if the Court were to allow such alterations to be made after parties had revised their papers, it would be tantamount to introducing the old form of revisal and re-revisal, now happily abolished, and leading to great expense and delay in closing records. The Court, after hearing counsel, held that the alterations were not of a nature which could be permitted to be made on adjustment, and offered the pursuer the option of withdrawing his first revised condescendence and substituting the present, on payment of previous expenses. This the pursuer declined, and stated that he would adhere to his first paper; and the Court therefore refused to receive the adjustments, and found the pursuer liable in the expenses of the present discussion, which they modified to L.10, 10s.

**DALRYMPLE v. BRUCE.**—June 12.

*Lease—Clause—Construction.*

The pursuer, James Dalrymple, purchased the estate of Wester Langlee from the defender, George Bruce, and he entered into possession, and paid the price of L.23,100, at Martinmas 1856. A difficulty has arisen as to the missive of sale, which was written by the pursuer, in consequence of this sentence:—"The rents of crop 1856 being then payable at Candlemas and Lammas 1857 to belong to you (i.e., the seller), you paying the public burdens effeiring to that crop." The seller has drawn L.597 of rent due at Candlemas and Lammas 1857; and the present action has been raised to recover these rents, on the ground that the rents payable in 1857 were the rents of 1856, and not the rents of 1857, and that the expression in the missive describing the rents of 1856 as payable at Candlemas and Lammas 1857 was a mistake, the rents of 1856 having been paid at Candlemas and Lammas 1856. Lord Ardmillan held, that as the rents payable in 1857 were the rents of 1857, and were by law the property of the pursuer, who entered into possession at Martinmas 1856, that the obvious mistake in missive could not form a valid contract to entitle the defender to retain them; and the Court adhered, with expenses.

**M'GREGOR v. TOLMIE et al.**—June 13.

*Heritable or Moveable—Machinery.*

The advocator, in March 1857, presented a petition to the Sheriff of Lanark, to obtain delivery from William Tolmie, trustee on the sequestrated estate of B. W. Dods and Co., of a steam engine which he had bought from them before the bankruptcy. This application was opposed by Arrol, who, as a creditor of Dods and Co., had obtained an *ex facie*

absolute disposition of the heritable subjects with which the engine was connected, on the ground that the engine itself was heritable, and had been conveyed to him as an accessory of the heritable subjects. The engine was in a house from which it could not be removed without part of the building being taken down. The Sheriff held the engine to be heritable, and to belong to Arrol. The Lord Ordinary pronounced a similar finding, and to-day the Court adhered, reserving the purchaser's right as regards the trustee, in case Arrol's claim on the heritable subjects is satisfied without the engine. The Lord President—The present case depends on circumstances. Mr M'Gregor's case is a hard one. He made the purchase in good faith of what he considered a moveable subject, but he was rather too good-natured in paying the price without getting delivery. There was a certain amount of fixing, as there was a house over the engine, and the engine could not be removed without removing part of the house. Dods' right to the engine rests upon the conveyance from Wilson, and he gave to Arrol all the right which he got from Wilson. The other judges having concurred, the Court adhered.

**M'KELLAR v. HIS CREDITORS.—June 13.**

*Cessio—Examination of Bankrupt.*

M'Kellar, the pursuer of this cessio, was a wright and builder in Govan, and in the Sheriff Court of Glasgow he has been refused cessio without personal examination, the Sheriff refusing to examine him after an order had been pronounced to that effect, because the certificate of the trustee was very unfavourable. The Lord President said that there had been irregularity here on both sides, but the main point was, that the Sheriff had pronounced an order for the bankrupt's examination, and that everything had been put in train for it; that then, owing to the unfavourable opinion of the trustee, the Sheriff had refused to examine the bankrupt. He was of opinion that it would be exceedingly perilous to sanction a refusal of the kind to examine a bankrupt after an order to that effect; and the opinion of the Court was, that the interlocutor reclaimed against should be recalled, and a remit made to the Sheriff to examine the bankrupt, and proceed after investigation.

**MOWBRAY, ROBERTSON, AND BURRIDGE v. ROBERTS.—June 16.**

*Expenses—Agent and Client.*

In this action the pursuers objected to the defender recovering his expenses subsequent to 13th October 1858, on the ground that the agent who conducted his case, Mr John Paterson, S.S.C., had no attorney certificate for the period subsequent to October 1858. The Lord Ordinary, on the authority of the cases of *M'Gowan*, January 24, 1828; *Clyne*, May 31, 1837; and *Thomson*, November 28, 1838, repelled the objection, and held that a party holding an award of expenses can obtain decree for such expenses in his own name against his opponent, even though his agent had not an attorney's certificate during the action. The pursuers reclaimed. The defender objected to the competency of the reclaiming note, on the ground that it was not presented within ten days after the date of the interlocutor reclaimed against, being an interlocutor relating to expenses only. This objection, after considerable argument

upon it, was ultimately waived, and the Court without any difficulty adhered to the Lord Ordinary's interlocutor.

## SECOND DIVISION.

MACKENZIE *v.* MACKENZIE.—*June 1.*

*Entail—Improvement Debts.*

This was a petition by Hugh Mackenzie, Esq., who is heir of entail in possession of the entailed estate of Dundonnell, to have the cost of certain alleged improvements upon it charged against the estate, consisting *inter alia* of two roads, one being of the nature of a public road, connecting the main line of roads in the West Ross-shire, with a new line made by the Highland Destitution Committee in 1849. The Court refused to allow the expense of this road, which was thus connected with two public *termini*, to be charged against the heirs of entail; but *quoad ultra*, allowed the petitioner to take credit for the expense of forming a private road to his own deer forest, and which was also available for the purposes of sheep farming.

THE MAGISTRATES OF DUNDEE *v.* MORRIS *et al.*—*June 1.*

*Charitable Trust—Nobile Officium.*

In this case of the Morgan Hospital, the Court now pronounced the following interlocutor:—"Edinburgh, 1st June 1860.—The Lords, having resumed consideration of the process, together with the report of Professor Swinton and the objections thereto by the parties respectively, and heard counsel, before further answer, remit of new to the reporter (1) to reconsider, with the advice and assistance of an actuary or actuaries, the rate of interest at which the annual cost of maintaining the hospital ought to be capitalised, assuming that the funds are to be invested in heritable securities, and not in feu-duties from house property, and taking into view, at the same time, the allowance of 5 per cent. for contingencies which the reporter proposes, and the accumulation of interest which must arise before the hospital is brought into full working order; (2) to report specially whether two acres of ground be sufficient to provide a site for the hospital building, and also for playgrounds and gardens, taking into view the probability of the adjacent ground being occupied by buildings; (3) to report what provision ought to be made in estimating the annual cost of maintaining the institution, and for payment of income-tax; (4) to report what are the causes of the apparently large difference between the anticipated annual expenditure of the proposed hospital and that of the Orphan Hospital of Edinburgh—the former being L.23, 10s. per boy, while the latter is only L.16, 9s. 6d. per head of the inmates; (5) to consider and report whether any and what benefit may be expected from the inspection of the educational work of the hospital by an inspector, having no independent authority, but appointed directly by the ordinary governors of the institution: And the Lords recommend the reporter to report *quam primum* without again hearing the parties, but without prejudice to either of them, laying before the reporter such additional information in matters of fact as they may desire."

## LEITH DOCK COMMISSIONERS v. LOCKHART'S TRUSTEES.—June 1.

*Superior and Vassal—Entry.*

This is an action brought by the Leith Dock Commissioners, as superiors, to have it declared that the defenders, who are the trustees of the late William Lockhart, Esq. of Lockhart, are bound, as vassals, to make up and complete in their persons proper titles to certain subjects at the West Docks, Leith, which had been feued for an annual payment of L.145 by the predecessors of the pursuers to the predecessors of the defenders. By the original feu-charter, all subsequent disponees were taken bound to enter with the superiors within three months of the respective dispositions in their favour. Mr Lockhart became possessed of the subjects in 1828, and was infest in them, but never entered with the superiors. He died in 1856, and his trustees, not considering the subjects worth the feu-duty and burdens, refused, when called on, to make up titles and enter. The Court pronounced decree in favour of the pursuers, in terms of the declaratory conclusion of the summons, finding that the obligation to enter as vassals is binding upon the trustees. Consideration of a conclusion in the summons craving the Court to ordain the defenders to enter was superseded; it being observed, that if the trustees should not now fulfil their predecessor's obligation, a very difficult question would arise, whether the Court should ordain specific implement, or should merely award damages for non-implement.

## MERRY AND CUNNINGHAME v. BROWN.—June 8.

*Arbitration—Clause—Oversman.*

The pursuers are lessees of a portion of the minerals upon the estate of Woodhall, in Lanarkshire, formerly belonging to Walter Frederick Campbell of Islay, and now belonging to the defender, as trustee of his sequestration. The agreement under which the minerals are let contains a stipulation that, "should the minerals become exhausted, or workable only at an evident loss, the tenant shall be entitled to give up the lease, on the same being ascertained by arbiters mutually chosen." It is alleged by the pursuers, that since 1855 the minerals have been workable only at a loss, and in 1856 they named an arbiter, and raised the present action, calling upon the defender also to name an arbiter, and to enter into a formal deed of submission, containing a clause of devolution on an oversman, to ascertain the fact of loss, and then to have it declared that the pursuers were free from the lease. The defender, without admitting that the clause requiring reference to arbiters was valid, offered to appoint an arbiter, and did name one, but declined to agree that the arbiters should name an oversman. This offer not being accepted, and the questions as to the validity of the clause of reference not having been raised with sufficient specification in the present action, a second action was brought, in which, in July last, it was determined by the Court that, although arbiters were not named in the clause, a valid obligation was constituted to refer to arbitration the question whether the minerals were workable only at an evident loss. Consideration of the present action was then resumed, and the whole Court was consulted upon the question whether the defender was bound to consent to the arbiters having power to name an oversman. The Court being of opinion that he was not, an interlocutor was pronounced, giving effect to that opinion, and appoint-

ing the arbiters formerly named to proceed with the arbitration, but reserving for further consideration what will be the consequence if the arbiters should differ in opinion, or the arbitration should otherwise prove abortive.

**M'CALLUM v. THE FORTH IRON COMPANY.—June 12.**

*Interdict—Nuisance—Mining.*

The respondents are the lessees of a large mineral field in Fifeshire, including the lands of Cowdenbeath, which they work under a tack dated 11th October 1851, with the usual powers of working and calcining. The complainer, a grocer in the village of Cowdenbeath, feued a piece of ground in that village from Mrs Stenhouse, proprietor both of the lands and minerals. He now seeks an interdict to prevent the respondents from calcining iron on certain ground contained in their lease, adjoining the village, and from 85 to 100 yards from his house, on the ground that the smoke, odour, etc., are prejudicial to the health and destructive of the property of the complainer and others living in the neighbourhood. The Lord Ordinary having refused the interdict, the complainer reclaimed. The Lord Justice-Clerk observed that he had never heard a clearer case. To grant such an interdict would be a precedent for chasing ironmasters out of Scotland,—rather too serious a matter for the prosperity of the country to be done hastily. The complainer himself stated that before he built his house a heap had been calcined within 244 yards of its site; but that after he had built it another heap was calcined at 85 yards, which was intolerable. He did not aver that calcining was then begun for the first time in that locality, or that it was unnecessary; he described the process, and said that the respondents were in “the habit” of calcining. Two occasions only were mentioned by him; it was clear, therefore, on his own statement, that calcining had gone on there before. He had therefore come to the nuisance with his eyes open, and could not now complain. Lords Cowan and Benholm concurring, the Court refused the interdict.

**FRASER v. M'IVER.—June 15.**

*Sequestration—Contingent Claim—Ranking.*

This was an appeal against a decision by the trustee in the sequestrated estate of the late Donald Fraser, senior, merchant in Dingwall. In 1849, certain property was adjudged at the instance of Donald Fraser from a Mrs M'Pherson, and was afterwards disposed by him, with absolute warrandice, to the Caledonian Bank. The bank sold the property to a Mrs Garden, and assigned to her Donald Fraser's warrandice. After that sale, Mrs M'Pherson, in 1855, brought an action of reduction against Mrs Garden, concluding that the adjudication and the subsequent sales should be reduced, and that she should be evicted from the property. Donald Fraser had died in February, and had been sequestrated in November 1854; and when the action of reduction was raised, Mrs Garden lodged in the sequestration a contingent claim for the value of the property, in the event of her being evicted from it. In July 1859, the Court of Session assoilized the defender from the conclusions of the action of reduction, and in respect of that decree the trustee, in November 1859,

rejected the contingent claim made in the sequestration. Mrs M'Pherson has intimated her intention of appealing to the House of Lords against the decree in the action of reduction, but she has not yet lodged her appeal, on account, she says, of present want of funds. In these circumstances, Mrs Fraser, the executrix of Mrs Garden, who has died, appealed to the Lord Ordinary to recall the deliverance of the trustee. The Lord Ordinary confirmed the deliverance, and the Court (*dubitante* Lord Cowan) recalled the interlocutor, and reversed the trustee's deliverance. Lord Wood said, that under the Bankruptcy Acts it was competent to rank contingent claims, not only when the date of payment was uncertain, but also when it was uncertain whether they would ever be due at all. From the rule that contingent claims might be ranked, though it might be uncertain that the obligations on which they were grounded might never become proper debts at all, there was no reason for excepting the obligation of warrandice of a heritable subject. It was not to be held, however, that in every case contingent claims were to be ranked. The contingency might be such that it would be highly improbable that a proper debt could ever be due, as, in the case of warrandice, where the obligation had been granted at a distance of time, and no surmise of a challenge had been heard, and no ground of challenge suggested. Whether a contingent claim for warrandice was to be ranked would depend upon circumstances, and upon the probability of the creditor having to fall back upon it. If in this case the action of reduction at Mrs M'Pherson's instance had been brought before the bankruptcy, and a claim made upon warrandice at the outset, it would be difficult to see how such a claim could have been distinguished from other cases of contingent claims. If a claim on warrandice were made during the sequestration, it would have to be ranked subject to the condition that any previous distribution was not to be disturbed. That was an incident inseparable from the nature of the claim. It might be said, that to allow contingent claims of this kind to be ranked, might cause delay in winding up sequestrations; but that was an observation which could be made with regard to all kinds of contingent claims, and was one not of special force in this case, because the delay now could not be much greater, as the time for appealing against the decision in the reduction would soon expire.

*Pet., HARVEY.—June 15.*

*Right of Administration—Custody of Children.*

This was a petition by a father, praying for access to his children, and also for warrant to remove them from their present residence with their maternal relatives, and for a direction that for the future they shall remain under the custody and care of the petitioner, without interference on the part of any of the respondents. The application was opposed by the children, who were above the age of pupillarity, and to whom a *curator ad litem* had been appointed, on the ground that the applicant had committed adultery with their mother's sister, and that for twelve years since he had been excluded from all intercourse with his wife's family and relations. It appears that in 1848 a divorce had been obtained at the instance of his wife, in which the adultery had been proved to the satisfaction of the Court; and the applicant had since attempted to renew the connection with his sister-in-law. In delivering judgment, the Lord

Justice-Clerk summed up the law applicable to such cases, in the following propositions :—1. That the control to which a *minor pubes* is subjected does not proceed on any notion of his incapacity to exercise a rational judgment or choice, but rather arises on the one hand from a consideration of the reverence and obedience to parents which both the law of nature and the Divine law enjoin, and on the other hand from a regard to the inexperience and immaturity of judgment on the part of the child, which requires friendly and affectionate counsel and aid. 2. That the power of a father is conferred not as a right of dominion, or even as a privilege for the father's own benefit or pleasure, but merely, or at least mainly, for the benefit, guidance, and comfort of the child. 3. That, therefore, the father's authority and right of control may at this age of the child be easily lost, either by an apparent intention to abandon it and leave the child to its own guidance, or by circumstances or conduct showing his inability or unwillingness to discharge rightly the parental duty towards his child. 4. That in all questions as to the loss of the parental control during puberty from any of these causes, the wishes and feelings of the child himself are entitled to a degree of weight corresponding to the amount of intelligence and right feeling which he may exhibit. After commenting upon the details of the evidence, his Lordship continued :—It is under these circumstances that the present petition has been presented, and the Court have to determine whether they will interfere with the existing arrangements for the maintenance and education of these young persons, and compel them, against their strongly-expressed wishes, to place themselves under the care and control of their father, the petitioner. The children are asking no maintenance from their father. It is not denied that, for the last twelve years, since their father's divorce, they have been brought up with the most affectionate care, and that in their present situation they are furnished with every comfort, and with an education befitting their station. On the other hand, their father, who demands their restoration to his custody and subjection to his parental authority, has been guilty of the capital crime of incest. This is a great family crime, which necessarily makes him an outlaw from that family which he has so grievously injured, and is sufficient to justify any measures which the Court may think necessary for the protection of the children, however much they may trench on the legal authority of the father. With this guilt attaching to him, and apparently, from his conduct and letters, unconscious of the enormity and incapable of understanding the true nature of his crime, he is the most unfitting and unsafe person that could well be found for the guardianship and control of a boy and girl of fifteen and fourteen years of age. The petitioner therefore is, in our opinion, personally disqualified for the exercise of the right and the performance of the duty of a father to his minor children. But the claim, if it could have been otherwise supported, is materially weakened, if indeed his right be not altogether lost, by his abandonment of his children to the care of others for a period of twelve years, during which he has neither exercised his paternal authority nor contributed anything to their maintenance and education. When to all this is added the strong and unbiassed expression of feeling on the part of the children themselves against intercourse with their father, the Court have no difficulty in refusing the petitioner's demand for the



custody of the children. And if the children be in the circumstances entitled, for the reasons now explained, to be held as emancipated from paternal control, it is impossible to see on what grounds the petitioner can assert his right to thrust his society on his children, or, as he expresses it, to obtain access to them against their wishes. The petition will therefore be refused, with expenses.

## HIGH COURT OF JUSTICIARY.

MAXWELL v. BLACK.—June 1.

### *Indictment—Specification of Laws.*

The complainer was, on 27th May 1860, tried for the crime of theft in the Sheriff Court of Cupar. The alleged *locus* of the offence was the complainer's "house, premises, or shop," which was said to be at "Rossie Brae, in the parish of Auchtermuchty and shire of Fife." The complainer's shop is at Rossie Brae, in the parish of Collessie. His agent at the trial contended that he should be acquitted, because the parish in which the *locus* was situated had been mistaken. A suspension was then brought, reliance being placed on the decision of the whole Court in the case of Gordon, 1812. The Lord Justice-Clerk said that, owing to the importance of the point, their Lordships had thought it necessary to consider all the precedents, and they were unanimously of opinion that the objection must be sustained. The *fact* as alleged by the suspender, that the parish had been mistaken, was not denied, or sought to be avoided. His house had in the complaint been stated to be in the parish of Auchtermuchty, when it was in Collessie. That was not a mere inaccuracy in description, but a *false* allegation as to the *locus* itself, and in that respect it differed from all the cases of misdescription on which the respondent had relied. He then proceeded to explain the cases. The first was that of Robertson, in 1728, for child murder, said to be committed in the parish of Torryburn, in the county of Perth, when Torryburn is in the county of Fife, and that objection, which had been apparently raised on the relevancy (how he did not know), was repelled. But that judgment, if it was really in point, had been departed from in the case of Gordon in 1812, the *locus* of whose offence was said to be a wheat field in the parish of Arbroath, when it was in the parish of St Vigean, and in that case, in considering the special verdict of the jury, the Court had held, in the words of Baron Hume, that when the parish was described it must be correctly described. To that proposition he gave his unqualified assent. None of the cases referred to overruled that case. Sir A. Alison mentioned two, and gave his opinion in accordance with the case of Gordon. In one of the cases he mentions, he states that the Advocate-Depute abandoned the case; but as he was Advocate-Depute himself, the opinion of the Advocate-Depute and author are one. (A laugh.) The other case was one of murder tried at Inverness, the murder itself being said to be committed at Dalkeith. On reading that, he thought it strange that a murder committed at Dalkeith should be tried at Inverness, and it suggested to his mind a fatal want of jurisdiction. But, on looking a little farther into the matter, he found that the case was not a case of *locus* at all—(laughter)—but one of mis-

understanding of the murdered person. The opinion of Lord Moncreiff, reported by Mr John Shaw, could not be relied on, because of the great inaccuracy of his reports. He had dealt with the case as if he were directing a jury; and while not thinking it necessary that the parish should be specified in the indictment, yet if the offence were proved to have been committed in a parish different from that specified, he would direct acquittal. Lords Ivory, Cowan, and Neaves concurred. Conviction suspended, with expenses.

*Susp.*, ROBERTSON *v.* ADAMSON.—*June 18.*

*Indictment—Time.*

This was a suspension of a conviction under the Day Poaching Act. The objection was taken, that the conviction did not define the time of day at which the offence was committed, in the manner in which the Act of Parliament defined it. After hearing counsel, the Court sustained the objection and granted the suspension, holding that an indictment ought to set forth what makes the offence manifestly a breach of the statute; that if the present conviction had referred to the time of day as defined by the statute, or as stated in the petition, this would have been sufficient; but that, in the absence of both, the conviction could not stand. Other objections, however, having been repelled, the Court gave no expenses to either side.

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APPEAL IN THE HOUSE OF LORDS.

The Right Honourable BARON SALTOUN, *Appellant*, *v.* THE LORD ADVOCATE, on behalf of the Commissioners of Inland Revenue, *Respondent*.

These proceedings originated in an information filed in the Court of Session, as the Court of Exchequer, by the Lord Advocate against the appellant, Lord Saltoun, claiming the sum of L.509, 12s. 7d., as succession duty, payable by him under the 16th and 17th Victoria, cap. 51, with a penalty for neglect of payment, of L.16, 19s. 8d. for every month of such neglect. The Right Hon. Marjory, Lady Saltoun, executed a deed of tailzie of the lands of Castle Ness, of the value of L.16,987, dated the 9th of June 1846, "in favour of the Right Hon. Alexander George, now Lord Saltoun, and to the heirs of his body, whom failing, to Alexander Fraser, Esq., captain in her Majesty's 28th Regiment of Foot, presently in the East Indies, eldest son of my deceased son, the Hon. William Fraser, sometime merchant in London, and the heirs of his body." Lady Saltoun died in November 1851, and the Right Hon. Alexander George Fraser, Baron Saltoun, was infeft in the lands of Castle Ness under that deed of entail. He died in August 1853, without issue, and the Right Hon. Alexander Fraser, Baron Saltoun, the present appellant, came into possession of the property. The question then arose, whether he took the property under the deed of his grandmother, Lady Saltoun, or whether he succeeded as heir of his uncle, the Right Hon. Alexander George Fraser, Baron Saltoun, from whom he inherited the title. In the former case he would have to pay only 1 per cent. succession duty, and in the latter he would have to pay 3 per cent., under the provision of the 16th and 17th Victoria, cap. 51, of which the second section defines the word predecessor to denote "the settlor, disponent, testator, obligator, ancestor, or other person from whom the interest of the successor is or shall be derived." The Lord Advocate claimed succession duty at the rate of 3 per cent., upon the ground that Alexander George Fraser, the late Baron Saltoun, and uncle of the appellant, was feudally vested in the fee of the lands under the deed of entail; and the appellant having taken as his nearest heir, he was

the lawful ancestor of the appellant. The appellant contended that the entailor was the predecessor of all the heirs, taking under her entail, and that such heirs would only be liable to the smaller amount of duty. The Lord Ordinary in Exchequer decided, that the term "predecessor" was applicable to the entailor, Lady Saltoun, and that the appellant was only liable to 1 per cent. succession duty. On a reclaiming note, a majority of the judges were of opinion, that the interlocutor of the Lord Ordinary should be reversed, at the same time considering that the question was one of great difficulty. Against that decision the present appeal was brought.

Their LORDSHIPS, in delivering judgment, said, that in construing the statute upon which the case depended, they must bear in mind, that it extended over the whole of the United Kingdom, and therefore the words used by the Legislature must be taken in their popular sense, without regard to any difference which might exist between the laws of England and Scotland respecting succession. They were to say who was the predecessor of the appellant within the meaning of the Act. They were unanimously of opinion, that the appellant derived his interest under the deed of entail. Lady Saltoun, the maker of the deed, and creator of the interest, must therefore be considered to be his predecessor. Under these circumstances, the appellant was bound to pay only the smaller amount of succession duty, and the interlocutors of the Court below must be reversed, and the cause remitted with a declaration.

Mr ROLT applied for costs.

The LORD CHANCELLOR said the appellant might have the costs below, but not those incurred in the appeal.

Judgment reversed without costs accordingly.

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## English Cases.

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FOREIGN.—*Res Judicata*.—Where the plea to a declaration for money had and received was, that the plaintiff had impleaded the defendant for the identical causes of action as then sued for, and recovered from and been paid by the defendant the sum of L.45 and costs, in the Supreme Court of Constantinople, established under 6 and 7 Vict., c. 94—*Held* on demurrer to the plea, that a good answer to the action was disclosed by it. April 30.—ERLE, C.J.: I am of opinion that this plea is good, and that the judgment, therefore, should be for the defendant. It was objected that it was not stated sufficiently clearly that the Court had jurisdiction. We hold that it was sufficiently stated, and in the case of *Robertson v. Struth*, 5 Q. B. 941, it was decided that the declaration for debt on the judgment of a foreign Court need not state that the judge had jurisdiction over that Court; and if any objection as to its not having been clearly stated, the case referred to is a sufficient authority to show that such objection would not be valid. Here is the judgment of a foreign Court upon the issue between the parties, and payment of the sum recovered, which appears to me to be a satisfaction of the debt; and as to the Court having authority to adjudicate, the plaintiff has chosen his Court, and has had the judgment of that Court, and the other party has paid what was awarded. In *Henderson v. Henderson*, 11 Q. B. 1015, the judgment turned upon the point that it must be presumed that a foreign Court had authority over the matter. The great distinction between that case and the present one is, that the defence does not rest on the principle of the cause of action being merged in the judgment; but on the principle of there having been judgment by the Court to which the plaintiff himself resorted, and the sum recovered under that judgment having been paid by the defendant.

This seems to me to be analogous to a case where the parties have resorted to an arbitration, and the arbitrator has made his award, and the sum has been paid, which is binding upon both parties; and it is contrary to any principle of law, that a party who has chosen his own tribunal, and has got what was awarded to him, should be allowed, if he is dissatisfied with the decision, to go to another tribunal for the purpose of trying to get another award, which would be more satisfactory to him.—(*Barber v. Lamb*, 8 W. R. 461.)

**WILL.**—*Cy Pres.*—Testator devised lands to the use of the poor vicar of L. for ever, upon condition that the vicar for the time being should read or cause to be read in the parish church, about eleven in the forenoon, morning prayer according to the liturgy upon every Wednesday, Friday, and holyday, throughout every year for ever. "And it is my will that every vicar of L. which shall not fully and punctually observe and keep the condition aforesaid shall neither have nor receive any manner of benefit or advantage by this my will during the residue of the term of his natural life. If any of the vicars of L. hereafter shall neglect in the least to read divine service when and where as before required, then it shall and may be lawful for the vicar of W. (the trustee) to pay the profits of the land to the master of the free school of W. for and during the life natural of such negligent vicar of L., anything in this my will to the contrary notwithstanding." *Held*, that the "neglect" upon which a forfeiture was to accrue implied a wilful neglect, and that so long as the vicar had done his best by tender of his services to comply with the condition, but had not actually performed divine service on the specified days, from the impossibility of obtaining any congregation, he had not forfeited the provision made by the will for the poor vicars of L. Inquiry directed as to whether the intention of the testator for religious instruction and worship could be carried out by any other scheme than that pointed out by the will. *Wood, V.-C.*: The order he proposed to make would be, that the Court, being of opinion, upon the evidence, that attendance at divine worship on Wednesdays, etc., could not be secured in the manner required by the will of the testator, and that the vicar had not been guilty of any neglect in respect of the performance of the condition prescribed by the will in that behalf, and had not, therefore, forfeited the provision made by the will for the poor vicars of Leake; let an inquiry be made whether the intention of the testator, with reference to the religious instruction and worship through the services of the vicar, could be carried into effect by any other scheme than that pointed out by the will.—(*Re Conington's Will*, 8 W. R. 444.)

**CONTRIBUTORY.**—*Register of Shareholders.*—It is sufficient, in an action for calls, to prove that defendant was, at the time of making the call, the holder of shares, that the call was made and notice duly given (8 and 9 Vict., c. 16, s. 27). It was held not to be necessary under this section that the name of the holder should be on a register of shareholders sealed at an ordinary meeting of the company; but that there must be some register, whether sealed or not, containing the name of the holder and the number of shares held by him, and that a mere piece of paper containing a list of names, without stating residence or addition, or a numbering or appropriation of shares, is not a register, and cannot be used as evidence. It was held also that a register made and authenticated after the time specified by the Act may be valid. The argument for the defendant rests on section 8, which describes a shareholder to be "every person who shall have subscribed, etc., or who shall have otherwise become entitled, etc., and whose name shall have been entered on the register of shareholders." This is description rather than definition, as it is clear that a transferee is entitled to a share, and may be a shareholder without his name being on the register of shareholders, if it is on the register of transfers. We think the statute contemplated the process above described of numbering and appropriating, and may well have intended that an inchoate register-book, *bonâ fide* intended to be valid, might be taken for this purpose as a register *de facto*, al-

though not properly sealed, and also that the Act probably intended names to be added from time to time in intervals between the meetings for sealing. There is no decision on the point in respect of an original shareholder, and the dictum relating thereto in *The Newry and Enniskillen* case is extra-judicial. The principle laid down in *The Southampton Docks v. Richards*, and adopted in *The London Grand Junction Railway Company v. Freeman*, that a book *bona fide* intended to be a register, though materially defective, should operate as a register in an action for calls, on account of the inconvenience which would arise if a debtor could defeat the claim upon him by resorting to formal defects in the register of shareholders, supports our decision.—(*Wolverhampton New Waterworks Company v. Hawkesford*, 2 L. T. Rep. N.S. 354.)

CONSEQUENTIAL DAMAGES.—*Slander*.—In an action by husband and wife for slander of the wife, the declaration stated the words spoken, and as special damage that the plaintiff's wife had thereby lost the society of her friends and neighbours, and that they refused to, and did not, associate with her as otherwise they would have done, and she was much injured in her credit and reputation, and brought into public scandal and disgrace, and by reason, etc., she became and was ill for a long time, and unable to attend to her necessary affairs and business, and that plaintiff was put to much expense in and about endeavouring to cure her of the illness, etc.; and that by reason of the committing of the said grievances, the said plaintiff lost the society and association of his said wife for a long time in his domestic affairs, which he otherwise would have had. Upon demurrer, this declaration was held to disclose no cause of action. The principle on which the Court so decided was, that illness alleged to be caused by the slander was not such a special damage, or sufficient to give a ground of action. "The important distinction in this case," said Pollock, C.B., "is, that the mischief done depends entirely on the temperament of the individual affected by the words spoken, whether any damage would result or not." "If," said Bramwell, B., "this is a good allegation of special damage, it would be equally good to say that a person underwent great mental pain and suffering; and, if so, all words causing mental pain may become actionable, unless, indeed, some distinction can be drawn between the suffering of mind and body. I therefore decide the case on the ground that the damage alleged is not a natural consequence of the words spoken—that is, a natural consequence of them in point of law. [In England, action is not maintainable for verbal injury, unless special damage be proved.]—(*Allsop and Wife v. Allsop*, 2 L. T. Rep. 290.)

BILL OF EXCHANGE.—*Cheque*.—In *Eyre v. Waller*, 2 L. T. Rep. N. S. 253, a cheque was held to be within the Summary Procedure on Bills of Exchange Act.

CULPA.—*Liability of Public Trustees*.—In an action for negligence against trustees of a harbour, sued by their clerk, it was proved that some rubbish had been shot into a berth in the harbour, without the privity of the trustees, who directed their clerk to cause it to be removed, and interfered no further, and had no further knowledge in the matter; that the removal was insufficiently done at their expense, leaving the harbour unsafe; that afterwards the harbour-master, not knowing that the berth was then unsafe, but knowing its original state, and what had and what had not been done, directed the vessel alleged to have been damaged by the negligence of the defendant to be placed in the berth, where she was placed accordingly, and suffered injury. Held, that there was no evidence of negligence on the part of the trustees.—(*Metcalf v. Hetherington*, 8 W. R. 475.)

THE

# JOURNAL OF JURISPRUDENCE.

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## CIVIL RESPONSIBILITY FOR PROFESSIONAL ERROR.

IN the dearth of subjects capable of being wrought into "interesting" articles, we may claim the attention of our readers for a subject in which most of them are interested. Jurists have started the inquiry, how far the lawyer is bound to sacrifice his own interests to those of his employer; but he must be possessed of a super-heroic spirit of self-sacrifice who is indifferent to the consequences which may possibly flow from an attempt to promote the client's welfare in opposition to his wishes and inclinations. The problem of which the profession are now waiting the solution, is to determine the limits of that discretion which every professional adviser undoubtedly possesses in the management of the business entrusted to his care. The vast importance of the question is apparent from this simple consideration, that a lawyer may any day be occupied with the settlement of transactions of a value far exceeding his whole private fortune. If in such matters he assume a discretionary power which does not belong to him, it is but fair that he should make reparation to the extent of his means for the consequences of that usurpation by which the interests of his client are imperilled. If, on the other hand, by reason of the necessity or expediency of the case, the law confers on the practitioner the power of acting for his client, justice requires that the exercise of such a power shall not be restrained by any civil responsibility, unless for wilful negligence or fraud. It is out of the question to suppose that a lawyer's fees are to insure his client against risk; yet it is impossible to stop short of that absurdity, if want of success is to be the criterion, or even an clement, in determining whether responsibility has been incurred.

Lord Stair, treating of a cognate subject, observes, that if a judge were liable to action at the instance of disappointed litigants, no one but a fool or a beggar would undertake the office ; an observation which is not unlikely to be verified, if the attempt were made to fetter the exercise of professional discretion in a similar way.

A distinction has not infrequently been attempted to be drawn between the responsibility of agents for professional error, and that of counsel. The distinction in question has not met with much encouragement from the Bench ; and it appears to us to be founded on a misconception of the true grounds of civil responsibility.

(1.) There is at any rate one principle applicable to all offices of responsibility, whether gratuitous or remunerative ; we mean, that *where a discretion is conferred*, no action shall lie in respect of the exercise of that discretion, unless fraud or wilful negligence be alleged. The discretionary power may be given in express words, as where a trustee is authorized, if he think fit, to invest money in shares ; or it may be implied, as in the case of an advocate retained to conduct a proof, who is entitled to exercise discretionary powers as to the calling of witnesses, and other matters, within the sphere of his professional competency and skill. If in either of these cases an action is brought for breach of duty, the inquiry will be, whether the discretion were actually exercised. If the trustee buys stock without looking at the share list ; or if the advocate comes into Court without having untied his papers, and, in ignorance of the merits of the case, neglects to examine an important witness, liability will unquestionably be incurred for wilful negligence. The difficulty in the case supposed would lie in establishing the fact of an absolute and entire neglect on the part of the defender, to avail himself of the sources of information which could alone enable him to exercise an intelligent discretion. But, except in the case of extreme negligence or fraud, it is obvious that any inquiry into the exercise of discretionary powers would be futile ; as it would inevitably result in the discretion of the Court being substituted for that of the trustee ; whose conduct would thus come to be measured by a standard of accuracy altogether different from that prescribed by the duty of his office.

(2.) Where the duty of a professional man is *not discretionary*, but *imperative*, the nature of the responsibility for faulty performance depends on the nature of the office, as being either *gratuitous* or *remunerative*. These two principles are, we apprehend, *sufficient*

to solve all difficulties in the application of the doctrine of responsibility for professional error.

We waive for the present the question of responsibility for slander, uttered in the conduct of judicial or professional business. Such responsibility depends on totally different principles, and is more analogous to that of a physician, if, by carelessness in making up a prescription, he should chance to poison his patient, or if, in the act of performing an operation, he were to cut off the finger of one of the assistants. But without adverting to *culpa* extrinsic to the business undertaken, the following summary appears to embrace all the principles that have been settled relative to professional and judicial responsibility :—

1. *Judges*.—The duties *imperatively* required of a judge are, that he shall hear the parties, and decide the matters submitted to his judgment. Therefore, although by the Act of Regulations of 1695, decrees arbitral can only be challenged on the ground of “corruption, bribery, or falsehood,” the Court have uniformly refused to sustain a decree in which either of the two essential elements of justice have been disregarded. The refusal to hear one of the parties has been termed constructive corruption; and deviation from the proper grounds of action in the decree, has been held sufficient to set aside the award, as being *ultra fines compromissi*. In the *Earl of Hopetoun’s* case (21 D. 782), an issue was granted to try the question, whether the decernitures were “wrongfully made,” without hearing the pursuer; and the case of *Lind*, in which a verdict was found for the pursuer at the last summer sittings, establishes the principle, that an arbiter is liable in damages for conduct amounting to “corruption.” It is not likely, at least in our time, that the Courts will be called on to decide upon any question involving the purity of the administration of justice under the authority of the Crown. But the opinions of the law lords, in the case of *Shedden v. Patrick* (1 Macq. 535), import, that if a decree of the Supreme Courts were tainted with fraud, it might be set aside, even though the proceedings had been perfectly regular in point of form. Nor has it ever been doubted that damages might be recovered from the judge of a superior court for fraudulent malversation of office. Thus, in the case of *Hagart v. Hope* (2 Sh. Ap. 125), Lord Craigie observed,—“I do not see that there is any distinction between superior and inferior judges; and I think judges or lawyers may be sued for damages for *malversations*



creating an injury to a practitioner before the Court." Lord Glenlee said,—“Where the only thing complained of is, that the judge has performed a judicial act in an improper way, there, I think, it would not do to allow an action. But if you come to a judge going *ultra vires*, though it may still bear the character of a judicial act, I think he would be responsible.” This expression of opinion was concurred in by Lord J.-C. Boyle. With reference to judges in the inferior courts (and the principle is exactly the same in both cases), Lord J.-C. Hope observed,—“I have no intention of laying down the abstract doctrine, that for nothing done by a Sheriff can he, in any circumstances, or on any averments, by any possibility, incur personal liability. Such a proposition would be most unsafe; for it is impossible to foresee what might perchance be done under the colour and cloak of judicial functions, or in the course of exercising such functions” (*Hamilton v. Anderson*, 18 D. 1018). This was also substantially the view taken by the House of Lords with reference to the case, so unlikely to occur, of a judge doing something altogether *ultra vires* of his office. The responsibility of judges for erroneous decisions is insured by the criticisms of an intelligent Bar, and of the public press. Our own experience leads us to believe that those are most tolerant of adverse criticism, whose judgments are the least likely to suffer by it.

These opinions, it will be seen, are in harmony with the principles explained in the outset. Unless the judge refuses to perform his duty, or corruptly perverts it, no action will lie; if the Court is satisfied that he has *bona fide* applied his mind to the case, they will not inquire further, but will presume that the high discretionary power with which judicial officers are entrusted, has been well exercised.

2. *Physicians*.—If a physician is guilty of culpable negligence,—as, for instance, by carelessly giving one medicine for another, or by neglecting to visit the patient at a critical period, or by inflicting a needless injury in performing an operation,—he is liable in damages. Thus, in *Dalziel v. Osborne* (20 D. 55), issues were adjusted to try the question, whether a patient had been injured by administering a noxious drug in place of a salutary medicine. But no damage is incurred by reason that the best remedies have not been used,—the particular remedy being always a matter of discretion, depending on the circumstances of the case, into which the Court will not inquire. If the patient is distrustful of the skill of his adviser, his remedy is to dismiss the doctor, or call in another.

It is matter of trite law, that a patient cannot be obliged to do or submit to anything the doctor chooses to prescribe. But if a surgeon has been allowed to commence an operation, we apprehend he is entitled to finish it, in spite of the resistance of the patient, which common sense requires him to attribute to physical weakness, and not to any deliberate intention to recall his authority. It is needless to add that the adoption of a different rule might be hazardous to life, and would deprive the surgeon of the confidence necessary to support him in this trying sphere of duty.

3. *Counsel*.—It is otherwise with the lawyer. A litigant may, at any moment in the progress of a law-suit, withdraw his mandate from his counsel and agents; for, although such conduct may be unreasonable, and may result in the ruin of his case, and of his whole fortune and prospects in life, there is no help for it,—the litigant being entitled to be as unreasonable as he pleases in the management of his own affairs. But he cannot control his legal advisers in the conduct of his case; who are bound, by their duty to the Court and to themselves, to do their utmost to attain success, and are not required to attend to the ignorant suggestions of the client. The law, which allows the litigant to be heard by counsel, proceeds on the assumption that he is unskilled in the conduct of law-suits; and it would be a practical absurdity to amerce the counsel in damages, because he refused to yield his judgment to that of the client in a matter in which his professional knowledge gives him the better means and opportunity of judging. On this principle, the Court, in the case of *Currie v. Glen* (9 D. 308), refused to allow a new trial, on the statement that the case had been abandoned without the consent of the party, who was present at the trial; and in *Mackintosh v. Fraser* (22 D. 421), the Court would not grant a rule for a new trial, on an affidavit that the Solicitor-General had neglected to examine the pursuer as a witness for his own case, after having agreed to do so. In both cases, it was observed that the party might have withdrawn his mandate in time to prevent the evidence from being altogether excluded, and might have either instructed other counsel, or conducted his case personally. If the party does not withdraw his mandate, he will not be allowed to go back upon any step that has been finally taken by his counsel on his behalf. We have more than once been present in the Criminal Courts when prisoners have made complaints that some absurd or improbable defence was not stated by their counsel; and the answer

made was always to this effect :—" You were at liberty to address the jury, either by yourself or by counsel ; you have already been heard by counsel, and cannot be allowed to make a second speech." In short, appearance by counsel is a privilege, and the party availing himself of the privilege must submit his judgment to that of his advocate.

The strength of this principle is also exemplified when viewed in relation to the control which counsel possess over the record. With a view to prevent the time of the Court being wasted in the discussion of frivolous and untenable pleas, it is deemed essential that every step in process be signed by the counsel or agent ; and it is a settled principle, that the procurator is responsible for the pleadings (*Hamilton v. Anderson*, p. Lord Ch. Chelmsford, 3 Macq. 373). In the Court of Justiciary, from the favour shown to prisoners, the rule was so far relaxed by statute as to allow special defences and lists of exculpatory witnesses to be signed by the panel ; but it is scarcely necessary to add, that indictments must be signed by counsel. In *Rennie v. Murray* (13 D. 36) it was ruled, that condescendences must be signed by counsel ; and the same was previously held with reference to defences.

The case of *Scott* (10 D. 732), in which a petition was sustained, though signed only by the party, is of doubtful authority. In the case of *Macdonald* (1857, unreported), the Court, without deciding that the petition was incompetent for want of counsel's signature, rejected it on the ground of informality. The applicant stated in Court that he had been unable to obtain the assistance of an advocate ; but it was observed, that if he had a pleadable case, counsel would not refuse to sign the petition. It is obvious to remark, that no action could lie against counsel for neglecting to state a ground of action or defence which he had been instructed to state ; the very object in requiring his signature being to insure that the case shall be stated by a person on whose discretion and skill the Court can rely.

In the case of *Halket v. Panmure*, July 1860, it was observed by the Lord President, that the *renouncing of probation* was a step which lay within the discretion of counsel, and in regard to which they could not be controlled by instructions. This power, his Lordship said, was analogous to the discretion assumed in regard to calling witnesses or addressing the Court, and was entirely within the mandate of the advocate. The other judges of the First Division were

understood to assent. If this be sound doctrine, the independence of the Bar of Scotland may be regarded as completely established in all that relates to the *bona fide* conduct of the action in Court ; for, if the advocate can foreclose his client from proof altogether, it would be ridiculous to dispute his right, when proof is led, to determine, if we may borrow the Parliamentary phrase, everything relating to "the matter, manner, measure, and time" of leading it.

In approaching the more delicate class of questions, as to the right of counsel to put an end to the action by compromise or reference, we do not propose to enter into elaborate investigation of the authorities on the point. Our object in this paper is rather to narrow the field of discussion by reviewing settled principles and stating difficulties, than to offer speculative opinions which would be of no practical utility to the reader. We confess we have not been greatly enlightened by a perusal of the ingenious arguments advanced in support of the action against Lord Chelmsford. The following considerations, however, may suffice to show the difficulty of the problem. First, it seems clear on principle, that counsel can have no general authority whatsoever, except during the progress of an argument or trial in open Court. The mandate of counsel must of necessity expire as soon as that particular step at which he was authorized to assist, has been brought to a conclusion. Again, it is eminently absurd to suppose that an advocate—who is instructed, say, to prepare a pleading—can agree to anything that will bind the client, except in so far as the pleading itself may bind him. The language of the popular metaphor by which the gown is said to be the advocate's mandate, implies that no *general* mandate can be claimed, except on the occasion of appearing in Court. Further, as the advocate cannot be presumed to be in a position to form an opinion on the merits of his client's case until that of the opposite party has been fully stated, it follows that he is in *pessima fide* if he agrees to surrender anything on an unclosed record. Up to this stage, therefore, there is neither reason nor authority to sanction a settlement made by counsel, without special instructions to that effect.

After an action has come into the debate roll, or has gone before a jury, it will be seen that it is extremely difficult to devise any practical limitation of the authority of counsel over the proceedings. At this stage, it is at least essential that the advocate should have a right of selection from amongst the various facts or arguments that may

be brought under his notice. Such a right, when carried to the utmost extent, implies that he may decline to lead any evidence, or to offer any argument, in support of his client's case; for there is obviously no resting-place between what Carlyle would call "the divine right of silence," and the opposite system, which would degrade the advocate into the mere mouthpiece of his client. Now, the silent system may be resorted to, either because the opponent's speech is unanswerable, or because it is not considered deserving of an answer. We have known instances in which the jury have been misled as to the real reason, and have given the mute orator the benefit of a verdict which would certainly not have been accorded to the most carefully studied effusions of the forensic art. The result, however, is generally quite opposite. If, then, an advocate has, and from the necessity of the case must have, the power of consenting to a verdict against his client, by simply sitting still and allowing his antagonist to walk over, is there anything to be gained by denying him the power of effecting a beneficial arrangement? Take the case of an action for libel. The publication, we will say, is clearly proved; and there is nothing to be said in justification. The defender is wealthy; and it is apparent to all that the jury are prepared to give heavy damages. In such a case, it is clear that a compromise by counsel may be agreeable to both parties,—the pursuer being satisfied by the withdrawal of all offensive expressions, and payment of expenses; while the *amour propre* of the defender is saved by the reflection, that his consent is not asked to the apology which is judiciously tendered on his behalf. It is needless to multiply examples; the experience of every professional adviser will suggest instances in which the power of compounding or settling a claim may be most judiciously and effectively exercised during the progress of the trial. Nor can we see any sound distinction between the two cases of compromising a suit, and referring it to arbitration, in the absence of the client. If there is any distinction; then, of the two cases, the act of entering into a judicial reference appears to be the more arbitrary exercise of discretion; yet it was conceded in *Swinfen's* case (2 L. T. 406) that the power of entering into a reference is inherent in the office of counsel; and this is also the doctrine of the Scotch Courts, as established by the cases of *Gilfillan v. Brown* (11 S. 548), and *Forbes v. Lord Duffus* (12 F.C. 321), and constantly acted upon in practice.

The circumstances which appear to have weighed with the Court

of Chancery in setting aside the compromise effected on behalf of Mrs Swinfen, were,—(1.) That the cause was not in the hands of the jury; the issue having been directed merely for the purpose of informing the conscience of the judge, who was entitled to disregard the verdict if against the weight of the evidence; (2.) That the compromise embraced matters beyond the scope of the action; (3.) That the client had been consulted before the negotiations were completed, and had refused to consent to the transaction. The last ground is amply sufficient, in our apprehension, to justify the decision. Desirable as it may be that counsel should be free to act for their clients in unforeseen emergencies, it is quite another thing to say that they shall stop the action, when the client insists upon having it tried. Common sense suggests that the client must have a veto in all matters vital to the action. It is mere mockery to consult him if his wishes are to be disregarded; and it is really a usurpation of the office of the judge for any advocate to say that he will decide that his client has no case, and will affect to deprive his fellow-citizen of his property without a trial, and in defiance of his known wish and desire. Nor do we think it desirable that damages should be withheld in cases of this nature. Let it be understood that there is no discretionary power to settle after the client's veto has been interposed. If the act is not a matter of discretion, there is no principle on which the advocate can claim immunity for civil responsibility. The act is confessedly *ultra vires* of the negotiator, and he cannot plead the discretion of an advocate for an error in judgment committed in a matter beyond the limits of that discretion.

We are not of those who imagine that any light can be thrown upon this region of legal ethics, or any useful explanation obtained regarding the principles of decision, by resuscitating the old fiction of advocacy being a gratuitous function. The principle that its duties are discretionary, appears to us to be amply sufficient to relieve practitioners from civil responsibility for error in all cases, except those of the grossest and most culpable negligence. Where the duty is such as to leave no discretion, it would be alike mischievous and impolitic to hold, that, because there was no lucrative contract, there should be no responsibility. Suppose, for instance, that an advocate were to neglect to prepare a note to be reponed against an interlocutor by default, and that a valuable claim is sacri-

ficed through his negligence ; is it to be supposed that his office would protect him from responsibility for this ? The peculiarity of his position is, that almost all his duties are discretionary, in a greater or less degree ; and it is this peculiarity, and this alone, which prevents the application of the ordinary principles of civil responsibility to the profession of the Bar.

We reserve for another publication some remarks on the responsibility of agents, which are necessary to complete the discussion of our subject.

#### COLLATIO BONORUM INTER LIBEROS.

THE collation which takes place between younger children in claiming legitim, is quite different in its nature from that collation which takes place with an heir when he claims legitim or dead's part. The former species of collation was derived from the civil law, while the latter seems to have arisen from the collision between the rules of succession under the civil law, and under the feudal system.

#### THIS COLLATION HAS NO PLACE EXCEPT IN THE DIVISION OF LEGITIM.

The object of collation is to secure an equitable *division* of the *legitim* among those entitled to claim it, and it applies only in questions between such parties. Jus relictæ and legitim are invariably fixed by the amount of the free moveable estate at the date of the husband or father's death, without taking into account advances or provisions made by him to wife or children during his life ; and once ascertained, their amount is not affected by collation afterwards. A widow, if entitled to jus relictæ, is entitled to the whole of it without collation ; and legitim, if due at all, goes entire to the child or body of children entitled to it, however much they may have received from their father during his life. See Erskine, iii. 9, 25 ; *Campbell v. Anstruther*, June 16, 1837, F.C. ; *Breadalbane v. Marquis of Chandos*, House of Lords, Aug. 16, 1836 ; 2 S. and M.L. 377.

It is not inconsistent with this doctrine, that if a child entitled at the date of his father's death to a share of legitim afterwards renounces it, the father's executor or residuary legatee may demand collation ; for he holds the right of the child who has renounced. Being in right of that child, he may call upon the other children

claiming legitim to collate, and will himself be obliged to collate the advances which have been made to the child whom he represents.

#### NATURE OF COLLATIO INTER LIBEROS.

Collatio inter liberos is an equitable rule for securing a fair division of legitim among those entitled to claim it, by taking into account advances made by the father to each child respectively during his life.

It was derived from the Roman law ; and as its origin throws some light upon its nature, the following passage is quoted from Mr Fraser's work on the Personal Relations, vol. i., p. 571 :—" By the ancient Roman law, emancipated children had no share of their father's succession, because they were not in familia at his death ; a rule which the prætors overthrew. By thus admitting these children to the succession, a great hardship was imposed upon those not emancipated, because, as the latter could not acquire any property to themselves, seeing that all their earnings went to their father, whose slaves they were in reality, the admission of the emancipated children to the succession gave the latter a right to a share of the property which the industry of the former may have amassed. To remedy this, the prætors subsequently decreed, that the emancipated children should throw into the fund all their own property (generally speaking) before they could claim a share of the paternal inheritance."

In our law no forisfiliation without a discharge of legitim will affect a son or daughter's right to claim it. The effect of collation is to bring into account, in the dividing of legitim, the advances which have been made by the father in his lifetime to each child, so that there may be an equality amongst the children.

#### WHAT ADVANCES MUST BE COLLATED.

Erskine (iii. 9, 24) states, that "every provision given by the father to the child falls under collation : not only the tocher, or other provisions granted in his or her marriage-contract, or in separate bonds, but all sums actually advanced by the father to the child, or for his behoof, though without any writing signed by the receiver obliging himself to account." Professor Bell, in his "Principles," says, sec. 1588 : "Advances will be imputed to the legitim in the following circumstances :—If made for the purpose of setting the child up in trade, or for a settlement in the world, or for a marriage-



portion." He then states the exceptions, which will be considered afterwards.

In the case of *Johnston v. Cochran*, 13 Jan. 1829 (7 S. 114), it was held, that a daughter who had received L.500 from her father on her marriage, was bound to impute that provision, with the interest thereof since payment, in satisfaction *pro tanto* of her legitim.

See also *Nicolson's Assignee v. Hunter*, 3 March 1841, Fac. Col.

In the case of *Kay v. Kay*, 12 July 1844 (16 Jur. 550), advances made to set a child up in trade were imputed to legitim.

#### ADVANCES WHICH ARE NOT THE SUBJECT OF COLLATION.

1. Advances which do not diminish the fund from which legitim is due.
2. Advances not gratuitous.
3. Advances intended as gifts in addition to legitim.



- 1 *Advances which do not diminish the Fund from which Legitim is due.*

*Heritable Subjects.*—As heritable subjects are not taken into account in fixing the amount of legitim, grants of such subjects in favour of a child who is not heir at law, do not affect the legitim, and are not brought into collation when that child claims a share of it. *Stair*, 3, 8, 46; *Ersk.* 3, 9, 25; *Marshall v. Marshall's Trustees*, 21 Nov. 1829, 8 S. 110. The rule in questions of this nature, for determining what subjects are heritable and what moveable, must be the same as that which applies in fixing the amount of legitim. If any subject is not taken into account in estimating legitim in respect of its being heritable, it is also excluded from collation.

*Advances made on Death-bed.*—As legitim is not affected by death-bed deeds, such advances must come entirely out of dead's part, and are excluded from collation.

*Legacies.*—These do not affect the amount of legitim, and therefore are not subject to collation. If a legacy is granted on the condition, expressed or implied, that the party taking it will not claim legitim, that condition must be complied with if the legacy is claimed. In the case of *Breadalbane's Trustees v. Duke and Duchess of Buckingham*, 5 March 1840 (2 D. 731), this point was so determined, in conformity with the unanimous opinion of the whole Court. Lord Fullerton said: "One rule of construction

I consider to be fixed,—that a testator who confines a child to a provision of a particular amount, declared to be in satisfaction of legitim, must be held to have intended, that if his power in this particular be challenged, and the legitim be claimed, the testamentary provision in favour of the party so challenging shall not take effect. Whether the case be put on the technical ground of approve and reprobate, or the more general ground of the implied intention of the testator, the consequence is the same. The specific provision is held to be conditioned on the compliance with the other parts of the settlement; and the violation of the condition of course vacates the provision to which it was attached." In this case, it seems to have been expressly declared that the provision should be "in full satisfaction of all my daughter could lay claim to in name of legitim," etc. But in the case of a general settlement, even when there is no such provision, it has been held that a child cannot claim legitim and take under it. In the case of *Henderson*, 26 July 1782, it was contended on behalf of one of the parties, that the settlement could only affect dead's part, and that there was no inconsistency in a child taking a legacy (or a share of dead's part) under the settlement and claiming legitim; but it was decided otherwise. A similar decision was given in the case of *Collier*, 6 July 1833. These decisions evidently rest on the ground that a general settlement carries all the moveables, and that a claim for legitim is incompatible with the integrity of the deed. See the joint opinion of the judges in *Fisher v. Dixon*, 6 July 1841, 3 D. 1181. The point was also decided in the case of *Minto or Clephane v. Kirkpatrick*, 20 May 1842 (4 D. 1224), where a general settlement, conveying the granter's whole means and effects to a son, and providing an annuity to a daughter, was held to be inconsistent with a claim for legitim made by the daughter: the deed made no reference to her legitim. The Lord Ordinary's judgment, adhered to by the Court, contained the following findings: "Finds that, though the said Margaret's right to legitim could not be affected or taken away by this settlement, it necessarily imported an intention on the part of the maker to exclude any such claim; and that this intention was thwarted, and the settlement itself in so far frustrated and disappointed, by the claim afterwards successfully made by the said Margaret for her legitim: Finds that, by insisting and prevailing in this claim, the said Margaret did directly impugn and repudiate, and to a certain extent defeat, the said settlement, and

could not, therefore, take benefit from, or maintain any claim under it."

When a child entitled to legitim takes under a general settlement as residuary legatee, he is entitled to plead on his own right to legitim, to the effect of reducing the shares of other children claiming it; and in doing so, he is not obliged to collate the residue. His claim for legitim is not necessarily inconsistent with the general settlement; but even supposing that the child were held to have renounced legitim by taking under settlement, the right so renounced would fall to the child as donee, and the same result would follow as before. This was expressly decided in *Fisher v. Dixon*, 6 July 1841, 3 D. 1181. In the opinion given by Lord Fullerton, concurred in by all the consulted judges, the following passage occurs:—"It would be a strange inconsistency to hold that William Dixon was, as has been found, entitled to plead on the claims of legitim of his sisters, who accepted the provisions in satisfaction of those claims in limiting the effect of Mrs Fisher's, and to refuse the same effect to his own claim, which he has neither renounced directly nor by implication. For it seems to be an abuse of terms to maintain that a child who takes the benefit of a general settlement in his favour, *eo ipso* renounces the claim of legitim. His legitim is nothing but a certain portion of the moveable effects of the testator, the whole of which are given him by the settlement. By taking under such a settlement, then, he renounces nothing: on the contrary, he acquires, in relation to a certain portion of those effects, an additional title to that which he held by force of law. In the first place, the general disposition gives him all the dead's part; and, secondly, it gives him all the fund of legitim, to a certain share of which he had a right independently of it." It may be observed, that if the residuary legatee's claim for legitim exceeds the residue, he cannot, after taking under the deed, claim legitim, because in such case the claim is incompatible with the deed.

## 2. *Advances not Gratuitous.*

(1.) When they go to extinguish an obligation lying on the father.

*When a Father is his Son's Debtor.*—In this case, indefinite advances made by a father to his son will be imputed to account of the debt until it is extinguished; and such advances, therefore, will not be subject to collation. Those who have right to jus

*relictæ* and *dead's part* have the interest to see that this is done. If the advances are allowed to be reckoned as payments to account of legitim, the debt will remain due by the father's estate, while the claim for legitim will still extend to a third of the free residue. The legitim would thus be indirectly increased by the advances made during life, while it would only have to bear one-third of the loss arising to the general estate, from the advances not being imputed to the debt.

*Recompense for Services rendered by Children.*—Stair says that donations to children for any special service done to their parents do not come under collation. An illustration of this may be found in the case *Minto v. Kirkpatrick*, 23 May 1833, where a son, who had been taken into partnership by his father, was held not to be bound to collate the value of the share of the company's stock which he so acquired, on the ground of its being to some extent remuneration for his services in superintending his father's business, as well as payment of a debt due by the father to the son as one of his mother's next of kin.

*Advances made for the Child's Upbringing and Education.*—As it is the duty of parents to support and educate their children, the expenses incurred by them in fulfilling this obligation are not looked upon as advances to account of legitim. In the case of *Irving v. Irving*, 7 February 1694 (4 Brown's Sup. 144), it was held that an apprentice fee was not subject to collation, because it is a *debitum naturale* on a parent to educate his children; and lawyers think that impensæ bestowed that way, "*nec veniunt in computationem legitimæ nec in collationem bonorum.*" It would seem to be consistent with this principle that the extent of the natural obligation on the parent should be the measure of the expenses for aliment excluded from collation; so that, if a child has been supported by his father after he was able to support himself, or has got a more liberal education than he had a right to expect from his father, the extra expense thereby incurred should be subject to collation. Lord Stair, however, says:—"Though one child were elder or longer entertained than the rest, or though more sumptuously, or though educated with more noble accomplishment, and at a greater rate,—as being bred at schools, travels, exercises, etc.,—neither the instruments requisite for these, as books, clothes, or the like, came under collation, or was there any estimate or consideration thereof. The reason is, because entertainment and education is pre-

sumed to be according to the fitness and capacity of the persons, whereunto a proportion is observed in all societies and communions; and therefore the parents are presumed to have expended upon their children proportionally, according to the capacity and excellence of their spirits, and to render them fit for the services of their generation; which, as they have a benefit, so they have with them a large burden and oftentimes hazard" (Stair, 3, 8, 26). It may be doubted to what extent this principle would now be carried. But even though it were held that these extra expenses were gratuitous on the part of the father, it still might be contended that the father, in giving the liberal education, did not intend to diminish the son's legitim. If this view were taken, nice questions might arise, as to whether in any case the liberal education was given by the father *sua sponte*, or at the son's request. If a son, after having received from his father an education suitable to his circumstances, gets advances from him at his own request to enable him to carry his education further, these advances would seem to fall under collation.

(2.) Advances which create an obligation on the son.

*When Father becomes his Son's Creditor.*—When advances are made by a father to a son, so that he himself or his executor can recover them, they do not come into view in the division of legitim. The son, in respect of such advances, is in the position of a debtor to his father's estate, but the executor may retain the son's share of legitim until the debt is paid. Loans made by a father to a son to set him in business, or to assist him when in difficulties, are in this position; so that, if the son becomes bankrupt and is discharged, not only will the father's estate suffer from the loss, but the other children cannot bring the advances so made into account in collation (*Webster*, 4 June 1859, 21. D. 915). It seems therefore to be advisable that the father, before making such a loan, should enter into an agreement with the son, that, if not repaid, the sum and interest should be taken as payments to account of legitim, without prejudice to the father's right to demand payment during his lifetime, or the executor's right to recover the balance, if the sum then due to the estate is not covered by the son's share of legitim.

3. *Advances intended as Gifts in addition to Legitim.*

A father has power to make gifts during his life to any of his

children in addition to legitim; and if his intention to do this is clear, these gifts will be excluded from collation. *Mortis causa* provisions and death-bed donations do not come into collation for another reason, viz., that they do not affect legitim, but are paid exclusively from the dead's part. Though the father may not have expressly declared his intention that the gifts shall not be collated, it may sometimes be inferred from facts and circumstances. Inconsiderable presents are presumed to be of this nature; but what presents will be considered so, will depend upon the circumstances of the parties.

M. R.

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CAUTION IN EXECUTRY.

THIS is a subject of practical importance. So many and so great have been the defalcations of trustees of late years, that the reports of the civil courts in England, as well as Scotland, are full of such cases,—some of them most revolting in their circumstances, and heart-rending in their consequences. The aid of criminal law has been called in to punish the fraudulent misapplication of trust-funds, in the futile hope of preventing the like abuses “in all time coming,”—a hope as empty as the words of style in an ancient indictment.

Executry, whether conferred by the nomination of the deceased or obtained by decree of the commissary, is equally an *office* of trust. The object is the administration of the estate for behoof of those interested as beneficiaries therein,—whether creditors, legatees, or heirs in moveables. The executor nominate need not have any interest in the estate to be administered. The executor dative not unfrequently has an interest in a *share* of the reversion, after payment of debts, but seldom is he the *sole* beneficiary.

In these circumstances, it is right and proper that the executor of *either* class should find caution for the proper exercise of his official duty, and the full accounting for and distribution of the estate. The office is voluntary, and no person is bound to accept of it. Often a legacy or some pecuniary benefit is provided to the stranger executor; and, previous to the Act 18 Vict., c. 23 (1853), he was entitled, under the Scotch statute 1617, c. 14, to retain to his own use a third of the dead's part of the succession, however great it might be, or, beyond a fair recompense for his labour.

Accordingly, executors of all classes were, by our ancient law, bound

to find caution before confirmation. In the words of Mr Erskine, "The commissary takes, *of course*, security from *every* executor at his confirmation, to make the subject confirmed forthcoming to all having interest in it."—B. 3, t. 9, sec. 33.

The Act 4 Geo. 4, c. 98, sec. 2 (1823), enacted "that caution shall not be required to be found by executors nominate."

The only plausible reason for this liberation of executors nominate may have been that which, according to law, liberated tutors and curators nominate from that responsibility. As expressed by Mr Erskine, "Because the confidence which the father places in them by the nomination, creates a presumption that he was well assured of their probity and diligence."—Ersk. B. i., t. 7, sec. 3.

It is no sound reason even for the office of a tutor, that the father, the nominator, had, at the time of nomination, confidence in his nominee, seeing that it is the pupil whose interests are at stake. But the reason is still less weighty in the case of an executor nominate, seeing that the persons for whom he acts are, in the first place, the creditors of the defunct, and in the next place, the beneficiaries, who may be numerous and far distant in residence, possibly in a foreign land.

At the time the exemption from liability to find caution was thus extended to executors nominate, their right to an ample remuneration (if strangers, as they often were) still remained as before.

The same section of the Act 1823 which thus entirely abolished caution for executors nominate, proceeded to deal with the other class of executors in the following words: "And in all other cases, the Court granting confirmation, *shall fix the amount* of the sum for which caution shall be found by the person or persons to whom confirmation shall be granted, not exceeding the amount confirmed."

It would almost appear, under the plain reading of this clause, that in *every* case the commissary must fix the amount of caution to be found by an executor dative. In practice, however, where the bond is signed for the *maximum*—that is, the amount confirmed—the interference of the judge has not been asked, as obviously unnecessary. He might fix a lesser sum, but could not require a greater.

Where the executor desired restriction of caution, the Act is silent as to the mode of procedure, and no Act of Sederunt has yet made provision for this most important duty, though several of these semi-legislative ordinances have from time to time appeared, regulating the Court of the Commissary on much less important matters.

The commissaries of Edinburgh showed their opinion of the delicate duty devolved on them by the statute, by issuing *Instructions* (a form of Consistorial Edict of ancient example), of date Dec. 31, 1823. The fourth Instruction runs in these words: "Where an executor dative intends to avail himself of the second clause in the Act, which empowers the Court to fix the amount of caution, such executor must present a written application, stating shortly the extent of the inventory to be confirmed, the amount to which he is desirous the caution should be limited, *and the grounds on which his demand is founded*, which application the Court will dispose of in a summary manner, *with a due regard to the circumstances of the case.*"

This regulation, like the parent Act, was equally silent as to any notice being required of such application.

For a long time after the passing of the Act 1823, very few applications for restriction of caution were presented, and the few were granted as matters of course, and without any public notice to those having interest.

In recent years, the number of such applications have increased; and it is now rare, in any succession of considerable extent, to have caution for the full amount. This very fact shows that there exists risk which is sought to be limited.

From the frequency of these applications, it has now become common to order advertisements in some local papers of the application and calling for objections. It is matter of grave consideration, whether such general notices subserve the purpose. The almost total absence of objections proves the uselessness of these notices.

It is well worth noticing the mere nominal sums to which caution is sought to be restricted, as appearing in the advertisements. L.5 and L.10 are favourite offers in estates well known to be of great extent. This is tantamount to dispensing with caution altogether.

This devolves a most important and delicate duty on the judge. It is said that, in some quarters, if no objections are lodged, the prayer of the petition is granted by the clerk as matter of course, without any inquiry.

A glance at the various possible cases may show the hazard of dealing rashly in this matter.

There may be an estate of considerable amount, but there may be debts of nearly the same extent. The creditors, relying on the good faith of the executor, allow him to be confirmed on nominal



caution. He realizes the estate, and escapes to some foreign land, leaving the nominal sum in the bond to be the only asset or fund *in medio*.

Creditors, however, are generally sharp enough, and may protect themselves in many ways. But there are other cases still more perilous.

A young widow, with young children, may, and often does, obtain the office. She finds nominal caution. Her office of executry and the amount of executry raise her importance in the world, and enhance her value in the matrimonial market. So some fine summer morning she may fly off to the Canaries or the Fejee Islands, consigning her babes to the tender mercies of some Blue Beard of an uncle, and carrying with her the whole savings of her departed spouse, and, it may be, accompanied by her cautioner, whose special security will now merge in the general burden of marital responsibility.

Another phase of the dilemma may be found in the case of an elder brother taking on himself the office for behoof of himself and younger brothers and sisters. He realizes the fund, invests it in business or speculation, and wrecks the whole.

It will be thus seen that the duty of the commissary is, in this matter, not one of course; but that the responsibility, morally at least, is great.

In the first place, the amount of the Inventory is the foremost point of inquiry. The next inquiry is the amount of debts. To that extent caution is indispensable. It may not be easy to discover the amount except by the vouching of a respectable agent, who, to the credit of the local Bar, may generally be relied on. If there exists any doubt, a list of debts, with affidavit thereto, might be required.

So far as regards the share of the executor himself in the reversion, to *that* extent the caution may safely be limited; and in this way relief is given to the scruples of a cautioner.

With regard to other beneficiaries, their number and description should be anxiously inquired into; their written consents to the limitation of the caution might be obtained in some cases, though, perhaps, these might be too easily obtained as between "near of kin," and not yet "less than kind." But in the case of beneficiaries resident abroad or minors, the Court ought to feel that it is, in a manner, their guardians in this respect, and bound to protect their interests. The character and position of the executor, and the

nature of the executry, will form important elements in fixing the amount of caution. The sum advertised as the offer ought never to be taken as the rule. But, in the words of the Commissaries of Edinburgh, before quoted, the applications should be disposed of "with due regard to the circumstances of the case."

Instead of calling for objections, and dealing with them in private, if the investigation was made in open court, at a diet assigned for the purpose, the presence of an intelligent Bar and the public, would be a guarantee against inaccurate or loose statements in support of the application.

Unless some such safeguards are adopted, it is to be feared that few years will not elapse until the evils of the present unsatisfactory procedure will be felt and exposed by many family calamities.

## NOTES IN THE INNER HOUSE.

## FIRST DIVISION.

*John M'Gregor v. Helen M'Gregor.*

THIS case raised a rather important question in regard to the Sexennial Prescription of Bills of Exchange. The original debtor, in the prescribed bills in question, was the late Robert M'Gregor, farmer, Delavorar, who died in 1853. The creditor was John M'Gregor, Tomintoul, the pursuer of the action. The bills were three in number, granted in 1849, and the six years had run on all of them by November 1856. The original debtor died before the six years had run, and was succeeded by his sister Helen, the defender. She did not appear to have acted actively as executrix, but gave authority to Mr Fleming, banker, Grantown, "to act for me, and on my behalf, in all matters connected with the affairs of the deceased." Under that authority Fleming acted, got in claims against the deceased, and made payments to creditors, and among others got in claims from the pursuer on these bills, and made payments on them. On 6th April 1857, after the six years had run, Fleming wrote the following letter to the pursuer's agent:—"On looking into Mr M'Gregor's claim upon the late Delavorar's estate, I find that he has been paid up the whole claim, except L.93. L.50 of that balance has since been paid by another obligant, and arrestments having been used in M'Gregor's hands, I must decline giving

up the documents and vouchers lodged." The question then came to be, Whether this letter contained a sufficient acknowledgment of the constitution and subsistence of the debt in the bills to elide the plea of prescription taken by the defender. It was contended that it was insufficient for that purpose, on the ground that it did not come within the category of documents capable of having such effect, which must, it was said, not only be dated after the lapse of the six years, but must also establish the value given for the bill. This contention was chiefly based on a passage in Lord Fullerton's well-known opinion, in the case of *Darnley v. Kirkwood*, 6 March 1845. In that case the Lord Ordinary held, that there were certain judicial admissions by the defender on record, which were sufficient to elide the plea of prescription; and Lord Fullerton, in the passage relied on, says: "It appears to me, that, if these conclusions were accurate, the sexennial prescription would be little better than a dead letter. How does the admission, even if made, of the authenticity of the subscription, prove the debt contained in the bill, without the additional proof *that it was given for value*? If that were the case, then in 99 cases out of 100,—in every case, indeed, in which forgery was not alleged,—the bill would be as good after the lapse of the six years as before." In giving judgment in the present case, the Lord President, with the approbation of the other judges, expressed his opinion that Lord Fullerton gave no sanction to the contention of the defender, that a document, to prove the debt after the lapse of six years, must expressly bear that the bill was given for value. "To require," said his Lordship, "that it shall be a document which establishes the value given for the bill,—meaning thereby, the particular value given for the bill,—is to require that it shall be a document of a kind that, in the course of my practice, I have hardly ever seen in the case of prescribed bills of exchange. But to hold that it requires to admit or show that, specifically, value was given, or that it shall mention value at all, is a doctrine which I cannot recognise, and which I do not find in the opinion of Lord Fullerton." The law, as laid down by the Lord President, is unquestionably sound; but it may be greatly doubted whether Lord Fullerton's opinion on this point is equally so, and whether it does not give considerable sanction to the defender's argument in the present case. The true view of the matter would seem to be this: by the lapse of six years, the debt due under a bill is cut down, both as to its constitution and subsistence. By the writ or oath of

the debtor, the creditor may again rear up his debt; but it will still remain open to the debtor, on the other hand, to prove that he gave no value for the bill, and therefore that he now owes his ostensible creditor nothing. Unless, however, the onerosity of the bill as granted is denied, it is not necessary for the creditor to prove that value was given for it; and it is not necessary for him, in order to elide the plea of prescription, to prove that value was given for it at all. The first thing to be done is to dispose of the plea of prescription one way or another; and then all other pleas competent to the debtor may be stated and maintained by him against payment.

*Leny v. Leny.*

This case related to the validity of the Dalswinton Entail. By the last will and testament of the late Dr Robert Leny, he declared as to the residue of his estate: "I bequeath to my nephew, Lieutenant James Macalpine" (now Mr Macalpine Leny of Dalswinton), "and to his heirs for ever, the whole of my property, whether real or personal." But the bequest was made under the condition that the proceeds should be employed by his trustees in the purchase of a landed estate in Scotland; and he stated his desire to be, "that the said estate, when purchased, shall be made over by a deed of entail, according to the formalities necessary in such cases in Scotland, to be enjoyed by my said nephew, Lieutenant James Macalpine, and his lawful heirs for ever, in regular succession. I desire, further, that the said estate shall be incapable, by the deed of entail, of being sold, alienated, divided, mortgaged, or of becoming burthened with debt in any manner whatever, excepting such as may be necessary for the due fulfilment of the provisions herein contained." The trustees followed out these instructions by executing a deed of entail, "to and in favour of the said James M'Alpine Leny, whom failing, to his lawful heirs whomsoever, in regular succession, declaring that so often as the succession of the said lands and estate shall open to and devolve upon females, the eldest heir female, and the heirs female of her body, shall exclude heirs portioners, and shall succeed always without division, through the whole course of the female succession, under or by virtue of these presents." The questions involved in the action were: 1. Whether the deed of entail executed by the trustees was authorized by the terms of Dr Leny's settlement; and, 2. Whether a deed with a destination such as that above quoted, without the exclusion of heirs portioners

therein contained, could be regarded as an entail under the Act 1685? The only part of the first question which it is necessary to notice here, is that as to whether Dr Leny's settlement, by directing or declaring that the lands to be entailed should be incapable of being "divided," rendered it competent for the trustees to insert in the deed of entail a clause excluding heirs portioners. The whole judges, with the exception of the Lord President, who doubted, and Lord Curriehill, who dissented, were of opinion that the trust-deed did not authorize an exclusion of heirs portioners. This opinion seems amply borne out by the terms of the trust-deed, and by the current of decisions. The trust-deed certainly does not expressly provide for such exclusion; and although in a number of cases it has been held competent to insert a clause of exclusion under the authority of implication only, that has merely been where such exclusion was in complete harmony with the prescribed destination. In the present case, however, such exclusion would clearly have run counter to the expressed destination to heirs whatsoever. But, further, the argument in favour of inserting the exclusion of heirs portioners was chiefly, if not wholly, rested on the testator's declaration that the lands to be entailed should be "incapable of being . . . divided." Now, in the first place, that declaration does not occur in the clause prescribing the destination, but among the general prohibitions; and there is no authority for spelling the destination out of the prohibitory portions of the deed. Again, the succession of heirs portioners does not *divide* the estate; it only makes it liable to division,—a liability which could be avoided, and the prohibition against division satisfied, by the heirs portioners possessing *pro indiviso*.

The second question, viz., whether an entail can be made in favour of heirs whomsoever, is one of large application, but not of very difficult solution. It may be solved—1. On the ground of authority; and, 2. On that of principle. 1. It is true no entail with a destination, beginning with and consisting entirely of a conveyance in favour of "heirs whomsoever," has ever been submitted to judicial consideration before the present case, otherwise it would not have arisen. On the other hand, it is quite settled that where a destination under an entail ends with a provision in favour of "heirs whomsoever," the estate becomes fee simple in the hands of the last substitute called before the "heirs whomsoever." "This is trite law," says one of the opinions in the present case; "but it ap-

pears to us necessarily to imply that where none but heirs whomsoever are called, there never has been an entail. The principle which, in the one case, infers the entail to have terminated, equally infers, in the other, that it has never begun. The principle applies alike at whatever point the breach is found."

But, 2. An entail in favour of a man and heirs whomsoever may be shown to be no entail at all under the Act 1685, c. 22, on very clear principle. This is most admirably done in the opinion of Lords Neaves, Kinloch, M'Kenzie, and Jerviswoode, who say:—"Substitution of heirs is essential to an entail. Whether the substitution be made *nominatim*, or by the specification of a class, there must be special designation, as opposed to legal succession. There must be *provisio hominis*, as distinguished from *provisio legis*. There is no substitution of heirs in a conveyance to an individual and his heirs whomsoever. In legal import it is simply a conveyance to the individual. The legal succession takes place at any rate, and does not require to be declared. In such a case there is, in point of law, no nomination of heirs. There is no *successio predilecta*. There is no one in whom a *jus crediti* is vested. The essential characteristic of an entail is wholly wanting." Nothing could be more distinct and conclusive than that way of disposing of the case. We cannot avoid expressing a wish that the Court always grappled with the principles of cases in a similar manner. Were they to do so, instead of too often endeavouring to ride off on some little specialties connected with the case, much litigation would be avoided.

Two minor questions were raised in the case. First, whether, if there had been sufficient authority for inserting in the entail the exclusion of heirs portioners, assuming the destination to have been to heirs portioners, the entail would have been good. In the view which the Court took of the case, viz., that there was no authority in the trust-deed for the insertion in the entail of the exclusion of heirs portioners, it was unnecessary to decide the question. It is certainly by no means unattended with difficulty, for while, on the one hand, it may be regarded as a limitation on the legal order of succession, and therefore of the nature of a substitution, on the other it may be considered as only creating an ambiguity or puzzle in the deed, which, on the general principle, must be construed most unfavourably for the validity of the fetters.

The other question was as to the proper legal meaning of the brocard, "*heres heredis mei est heres meus*." We must confess that no great amount of light has been shed in this case on that "maxim or supposed maxim." The truth we believe to be, that, except in a loose or popular sense, this brocard, like many others, does not enunciate a sound legal proposition. It is well, therefore, to be very chary in the use of such maxims, and to avoid spending overmuch time and ingenuity in the elucidation of that which is *sua natura* erroneous, inexplicable, or hopelessly obscure. The nearest approach to a successful attempt to explain the maxim in question is contained in the suggestion, that it is not meant by it, "that if the presumptive heir predecease, it is *his* heir, and not the heir of the proprietor, who takes the property. The meaning is, that, after the heir has succeeded, it is a transference to *his* heir, whoever he may be, which forms the legal course of inheritance according to the law of Scotland." This law is sound, but to express it we would prefer some other form of words than *heres heredis mei est heres meus*,—a form which certainly makes no reference to vesting, but relates to the character of heirship alone.

#### SOLICITORS IN BANKRUPTCY.

(*From the Law Times.*)

A CLAUSE in the Bankruptcy Bill prohibits solicitors from practising as counsel in the Chief Court of Bankruptcy at Westminster.

Hitherto they have been admitted to audience as advocates in the commissioners' courts. The alleged reason for refusing to them that privilege in the new court is, that its functions will differ considerably from those discharged by the commissioners. The business of the chief court will, it is said, be exclusively judicial, whereas the functions of the commissioners' courts were chiefly administrative; wherefore, then, should the Bankruptcy Court be treated as an inferior court?

To this it may be answered that bankruptcy is a peculiar business. It deals with facts and figures more than with law. The cases cannot be stated in a brief, like those in ordinary litigation, where there is seldom more than a single issue to be tried, and which therefore a stranger can sufficiently gather from the brief; but a bankruptcy presents such a multitude of small facts that no brief of moderate capacity could set them out, and they can only be mastered

by the head and hands that have gone through the accounts. It is impossible that a barrister, not always versed in mercantile matters, rarely a good accountant, and having taken no part in the working-up of the case, could handle it so well as the solicitor, whose duty it was to wade through the whole of it. It is contended also, that cheapness being the design of the whole measure, that object will not be promoted if the estate is put to the double cost of counsel as well as solicitor.

The first argument is unanswerable. There can be no doubt that the solicitor who works the bankruptcy is the fittest person to conduct whatever advocacy may be required in the court of bankruptcy. The argument of cost is not so tenable; for, in fact, the solicitor will charge for his work as advocate *in addition* to his charges for the work done as solicitor.

We trust, therefore, that the Attorney-General will not persist in the exclusion of the solicitors from advocacy in the new Bankruptcy Court. True it is, that, practically, the business is conducted by three or four solicitors only; but they should not be dealt with, because they are few, differently from the treatment they would receive had they been many. They do not ask to trespass upon the province of the Bar; they do not claim permission to hold briefs for other solicitors; but only to be allowed to conduct the cases in which they are *the actual solicitors*, having the *whole* management of them. This is a reasonable request on their part; it is manifestly desirable for the suitors, and we do not believe that it would be objected to by the Bar, which must acknowledge its comparative incompetency for the business proposed to be entrusted to it.

We believe it to be the opinion of all the commissioners, based upon long experience, that it will be for the advantage of the business, that the solicitor conducting the case should be heard in *all* matters relating to it; but that they should be strictly confined to the conduct of their own cases.

If the Attorney-General would adopt a clause giving audience in the new Bankruptcy Court to the solicitor *bona fide* conducting the case out of court as its solicitor, all that is sought will be attained, without violation of the rule which the Attorney-General probably alone desired and designed, viz., that a solicitor should not take a brief from another solicitor: for the same objection would apply to this as to the employment of barristers; for if the suitor is not to have the advantage of the services of his own solicitor as his advocate, but



another lawyer is to be retained, it is but reasonable that the stranger so chosen should be a barrister.

If the mere permission to the solicitor in the case to appear in person should leave the exclusion of others in doubt, the law may be made plain by an express enactment. And with such a limitation, we believe that the Legislature will offer no resistance to the recognition of the solicitor's privilege to be heard in his own cases in the new Court of Bankruptcy.

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### THE MONTH.

*Law Universities.*—Among the various schemes of improvement which bear the impress of that intellectual activity that characterizes the present generation of professional men, we may notice the proposal for a new Law University, which has already attracted a considerable share of attention in the English metropolis. The subject was lately brought before the Society for the Amendment of the Law; and, if we may judge from the comments of the *Law Times*, it is not unlikely to receive the support of the professional bodies. The prominent feature of the scheme, if we have succeeded in deciphering its somewhat shadowy outlines, is the proposed union of the various professional bodies into an incorporated society, with collegiate functions, for the purposes of providing instruction in law, and also of determining the qualifications and regulating the admission of members into the professions of barrister and solicitor. The promoters of this scheme point to the systems of instruction carried out by the physicians, surgeons, engineers, and other professors of the arts and sciences, as examples in point; and urge the advantages to be derived from an enlightened system of legal instruction carried out under the immediate superintendence of those who are most qualified to judge of its efficiency.

We feel assured that the profession will be desirous of affording every encouragement to the labours of those who take an interest in the question of legal education. Within the last few years, we have seen, both in Edinburgh and the provinces, a marked improvement in the qualifications required for entrance into the professional bodies. Some allowance must, of course, be made for differences of opinion as to the mode of carrying out educational improvements; but we confess the scheme of a general law university is no objectionable in principle, and appears to be attended with so many

practical difficulties, that we cannot look to it as the legitimate method of raising the standard of professional culture. It is not only important, but absolutely essential, that every professional society should retain in its own hands, entire and undiminished, the power of regulating the conduct and functions of its own members,—a power which would be seriously impaired, were the initial and all-important step of *admission* transferred to other hands. Under the present system, each member of the various legal corporations is actuated more or less by the consciousness that he is a member of a self-elected body, responsible to the public for the integrity and skill of its individual members; and there is underlying this feeling, a reciprocal sense of the duty which that member owes to the society of gentlemen who have admitted him to membership and to the relations of friendly intercourse which happily subsist between members of a common profession. These are considerations of vastly greater consequence to the welfare and good government of the profession, than any fancied accession of importance, arising from the incorporation of the various bodies into a university or aggregate society. Besides, the analogies of the medical bodies, etc., are all against the theory, for every one of the medical grades has ever strenuously insisted on retaining full power in the election of its own members. As regards the Scottish metropolitan bodies at least, the notion is, to a certain extent, realized in their existing constitution; the legal profession having obtained by Act of Parliament the *status* of a college, of which the judges are the senators. The ultimate power of admission being in the hands of the Court, imparts a character of unity to the entire structure; while the practical independence of the law bodies is secured by reserving to each society the right of deciding on the qualifications of applicants for admission.

It will not be supposed, from these observations, that we are averse to any alteration in the curriculum of legal instruction. Apart from the centralizing tendency of the London scheme, the suggestion that the profession should take the means of instruction into its own hands is a good one. To this effect, the practice of the medical and other arts affords an encouraging example. No one can doubt that the system of free competition among the medical lectureships both in Edinburgh and London, has greatly contributed to elevate the character of the instruction communicated in these schools. The Inns of Court also have set us an example, by ap-

pointing lecturers on law, whose prelections qualify the student for admission to these bodies. We do not see why the profession in Edinburgh should hesitate to sanction that system of extra-academical tuition, the utility of which is so generally recognised in the various walks of artistic and professional culture.

*Dundee Sheriffship.*—We are glad to be able to announce, that the controversy relative to the administration of the law in this important burgh, has been terminated in a manner which ought to be satisfactory both to the public and the individuals more immediately interested. Experience has repeatedly shown, that the amount of duty performed in the courts of justice, is by no means proportionate to the strength of the judicial staff. Not to refer again to the standing instance of the Court of Session, we would simply ask any disinterested member of the profession to inquire into the state of the Rolls in the Sheriff Courts of Edinburgh and Perth, respectively, when we will guarantee that any doubt he may entertain as to the general truth of our proposition will be set at rest. Such being the case, it was clearly the duty of the Government, before sanctioning the appointment of an additional Sheriff at Dundee, to institute an inquiry into the state of the business which was said to call for such an appointment. As a matter of course, the opinion of the Commissioner deputed to make the inquiry was conclusive of the matter of fact; and it only remained for the representatives of the Government to consider what arrangement could be made for facilitating the transaction of the judicial business of the Sheriffdom, without infringing on the principle laid down in Mr Shand's report. We are not as yet at liberty to mention the particulars of the arrangement which has just been completed; and which will, to a certain extent, involve a change in the constitution of the Court. We may say, however, that the inhabitants are much indebted to Sheriff Logan for his efforts in furtherance of their wishes throughout the conduct of this somewhat delicate negotiation. In the event of a new appointment being made, Mr Ogilvy, the resident Sheriff at Forfar, will, we understand, take his seat on the bench at Dundee.

*Privileges of the Two Houses of Parliament.*—The important constitutional questions that have been raised by the decision of the House of Lords on the Paper Duty Bill are not likely to be set at rest by the subsequent proceedings of the Lower House. On the one hand, it is quite plain that the Liberal section of the House of Commons have been prevented from taking action in the matter,

by the unexpected necessity for making provision for the expenses of the China war. On the other hand, it will be strenuously maintained by the advocates of equal privileges for both Houses, that the refusal of the Commons to vindicate their rights by action, is tantamount to an abandonment of their claim to exclusive control. We do not think that the captiousness or the remissness of any particular Parliament ought to influence the settlement of such a question either one way or the other. The Houses of Parliament, like the Courts of Justice, are each independent and uncontrollable within their own sphere; and it is matter of history that governing bodies, whether legislative or judicial, have persisted in a course in excess of their legitimate powers, until the flagrancy of some particular act, or the growing strength of some co-ordinate tribunal, has interposed a check upon the abuse of their privileges. Conflicts of jurisdiction between the Courts of Law occasionally arise; each Court, when it has the power, using it in defiance of the claim asserted on the other side; and it is greatly to the credit of our system of parliamentary government, that collisions have been of rare occurrence between the sources of legislative authority.

Yet the warmest supporters of Lord Derby must admit, that he has not improved his position with the country, by giving that advice which was unfortunately acted on by the House of Peers. The country is in no mood to relish the assertion of rights which have been virtually in abeyance since the Revolution; nor will hereditary legislation be regarded with much favour, when it takes the form to which it appears to be fast verging,—of deliberate and systematic opposition to the representatives of the people. We confess we see with regret the tone of servile adulation adopted towards the House of Peers by some of our contemporaries, who regard that House as a bulwark against democracy. We trust and believe that the good sense of the people at large will preserve us, in time to come, from the tyranny of democracy, as it has in time past from the tyranny of monarchy and aristocracy. But it is simply absurd to describe the present House of Commons as representing democracy in any invidious sense of the term. It is notorious that a majority of the members are connected with the territorial aristocracy,—a large proportion of them being cadets of titled families. That many of the titled representatives of popular constituencies have taken a prominent part in vindicating the rights of the people's House, is just another illustration of that dislike of arbitrary privilege which

has ever pervaded all ranks in this country, from the highest to the lowest, and without which, aristocracy could not exist in this country,—a principle which was lately illustrated by a member of the House of Peers, who declined to give evidence on his “honour,” stating that he did not see why a nobleman should be favoured above other men. Such facts suffice to show that there are many members of the highest families in the land, who justify the confidence reposed in them by the constituencies whose interest they represent in the House of Commons; while, at the same time, they furnish a practical answer to those malignant slanderers of the Constitution, who are continually flourishing before our eyes some scarecrow of a popular assembly, which is supposed to be a prey to the worst passions of the lowest section of the community.

*Scotch Bills in Parliament.*—In consequence of a standing order of the House of Lords, which prohibits the introduction of Bills into that House after the middle of July, the Lord Advocate has withdrawn his measures of Law Reform from the House of Commons, and introduced them, as new measures, into the Upper House. The mere statement of the reason which led to this step, is a complete justification of the Lord Advocate, or rather, it entitles him to the thanks of Law Reformers, for his earnest endeavours to facilitate the passage of these measures. On the merits of these Bills, we have already expressed our opinion at considerable length. We understand that the Titles to Land Act is to be introduced in substantially the same form as when it left the House of Commons, after being amended in Committee. With regard to the Husband and Wife Bill, we understand there is every probability of a clause being carried, allowing the evidence in consistorial cases to be taken in short hand, so as to secure a fair rehearing by the Inner House on the evidence. We have already stated the objections to the extension of this system to Jury Trial; objections which have not been removed on a further consideration of the matter, and which are shared, we believe, by the leading members of the profession in Scotland. The trial of consistorial causes without a jury is, in many respects, so different from jury trial, that we think there is room for the application of different principles in taking the record of evidence: the most important distinction being, that provision is made for a *rehearing by a different tribunal on the evidence*. This circumstance makes it especially important that every word should be taken down, in order that an ultimate decision may not be obtained on

different grounds from those which influenced the judge before whom the witnesses have been examined.

*Business of the Court of Session.*—The Court rose for the long vacation on Friday the 20th ult. The Session has not been a very busy one; in fact, the complaint of nothing to do was heard on every side. The Inner House sat regularly from 11 to 4, and both Divisions distinguished themselves by their anxiety for the despatch of business. The arrears of the First Division are now fairly under control. At the beginning of the last term, there were about 65 cases on the Short Roll. Of these, more than one-half have now been disposed of; and though this is not a large number, when it is remembered that it includes such ponderous cases as the Dalswinton Entail, and the Elgin Academy case, and that the Summar Roll frequently occupied the day till two o'clock, the country has no reason to be dissatisfied with the result. Let us hope that, with the disappearance of arrears, the Court of Session will once more regain its former popularity with the people. The Session is further remarkable for being the first in which, under Mr Dunlop's Law Ascertainment Act, Scotch lawyers have had a slice of the valuable succession of the late Dr Cochrane, which our Chancery brethren have been discussing with so commendable a zeal for so many years. The case of Lord G. Colvin is the first that has been sent down from the Court of Chancery for the opinion of the Court of Session; but as the question relates to the meaning of the Thellusson Act, the proceeding has more of a good-natured decency about it than any practical value.

The decision in the noted case regarding the rebuilding of Trinity College Church, is satisfactory as regards the doctrine laid down, though it is to be regretted that the Court did not consider they were in a position to apply the law under the conclusions of the present action. Lord Curriehill stood alone in his opinion, that the charity had not an interest in the distribution of the fund. The true principle, as indicated rather than expressed by the Lord President, we take to be, that the *surplus funds*, after providing a suitable church, are devoted to the purposes of the charity; though there is much force in the view taken by Lord Ivory, that the Hospital cannot be bound to any extent by an Act of the Legislature disposing of their property, unless their interests were fairly represented in and considered by Parliament.

## Legal Intelligence.

**THE LEGAL PROFESSION, ETC.**—On the 17th July, Messrs Archibald Anderson, David Peter Chalmers, and Alexander Nicolson, were admitted members of the Faculty of Advocates. On 28th June, Mr John Cowan, and, on 12th July, Mr Robert Macandrew, were admitted members of the Society of Writers to Her Majesty's Signet. The following gentlemen have been appointed notaries-public since the 1st of July:—Messrs James Hall, George Wood, George Miln, William Tait Roy, and Robert Brodie, writers in Glasgow; Mr James Keay, writer in Arbroath; and Mr William Otto Macqueen, writer in Sanquhar. The following gentlemen have been admitted associates of the Faculty of Actuaries in Scotland:—Messrs W. F. Birkmyre, David Pearson, and Andrew H. Turnbull.

**APPOINTMENTS.**—Mr James Hay Chalmers, advocate in Aberdeen, has been appointed Commissary-Clerk of Aberdeenshire, in room of Mr Blaikie. In consequence of the lamented death of Mr Parker, the office of Principal Extractor of the Court of Session Records has become vacant. The name of his successor has not yet transpired. Mr Hardyman, the assistant extractor, has been appointed extractor, *ad interim*, by the Court. We refer to the Sheriffship of Dundee in another place.

**HIGH COURT OF JUSTICIARY.**—The following are the appointments for the Autumn Circuits, 1860:—*North.*—Lords Justice-Clerk and Ivory. Perth—Tuesday, 25th September; Inverness—Wednesday, 3d October; Aberdeen—Monday, 8th October, at 12 noon. David Hector, Esq., advocate-depute; David Wylie, clerk. *South.*—Lords Cowan and Deas. Jedburgh—Tuesday, 25th September; Dumfries—Friday, 28th September; Ayr—Tuesday, 2d October. F. L. M. Heriot, Esq., advocate-depute; James Aitken, clerk. *West.*—Lords Ardmillan and Neaves. Glasgow—Tuesday, 11th September; Inverary—Tuesday, 18th September; Stirling—Friday, 21st September. William Ivory, Esq., advocate-depute; Alexander Stuart, clerk.

**EXPEDITION IN THE COURT OF SESSION.**—The following brief history of a case (*Martin v. Bannatyne and another, Mr and Mrs Martin's Trustees*), decided a few days ago in the Court of Session, deserves mention, as showing that "the law's delay" is not, now-a-days, always a fact, even though it be a proverb:—Summons signeted Friday, 6th July 1860, held as executed on same day, and *inducie* dispensed with; 12th July, Summons appeared in calling lists; 18th July, Defences lodged; 17th July, Case in weekly roll, when pursuer consented to close record on summons and defences, and avizandum made; 18th July, Record closed, and case partly debated; 19th and 20th July, Case further heard, and avizandum made; 20th July, Interlocutor issued by Lord Neaves deciding the whole case, which related to the construction of a marriage contract. Counsel for pursuer, A. B. Shand, Esq.; Martin, Whitehead, and Greig, agents. Counsel for defenders, D. Mackenzie and George Young, Esqs.; W. A. G. and R. Ellis and Wilson, agents.

**LORD SHAFTESBURY AS A PATRON.**—Sydney Godolphin Osborne appears determined to keep Lord Shaftesbury in warm water. He has written another letter to a contemporary, in which he shows that Lord Shaftesbury "is in office in an annuity institution which has broken faith with its poor clients." The society in question is the Royal British Beneficent Institution. In this society were 88 ladies, receiving annuities of from L.25 to L.80 a-year, and, from the statement made by the committee, these annuities were reduced as much as one-fourth, in consequence of a deficiency of funds. Lord Osborne says that the name of Lord Shaftesbury appears as a vice-president of the institution; and he further appears to have qualified himself as a governor, in 1852, by a payment of L.31.

**COUNTY COURTS.**—We extract from the *Manchester Examiner and Times* part of a paragraph headed, "Extraordinary Duration of a County Court Suit—

Robinson v. Lord Vernon."—In the Court of Common Pleas, Westminster Hall, 6th July 1860, judgment was given on an appeal from Mr Yates, the judge of the Macclesfield County Court. Dr Wheeler (instructed by W. P. Roberts, of Manchester) appeared for the appellant, and Welsby (instructed by Parrot, of Macclesfield) appeared for Lord Vernon, the respondent. The case was remarkable, as showing the great delays that may occur to suitors in the County Courts, when the judges of those courts take erroneous views of the law. The case had been argued on the previous day, and the Court had reserved its decision. *The action was commenced in the Macclesfield County Court so far back as the 21st April 1859.*—The various steps of process are detailed by our contemporary, from which it appears that two new trials had been obtained, and parties were on the eve of commencing a third, within a year after the action came into Court. Let English readers be thankful they have no worse delays to complain of. When we hear of a similar case in our own neighbourhood we shall chronicle it under the more appropriate title, "*Extraordinary Despatch in a Scotch Court.*"

INTERNATIONAL STATISTICAL CONGRESS.—The fourth session of the Congress was formally opened on 16th July. His Royal Highness the Prince Consort presided, and delivered an inaugural address.

A preliminary meeting of the first section, that of Judicial Statistics, took place on Wednesday preceding, at Somerset House, under the presidency of Lord Brougham, who has for years given much attention to this important branch of statistical inquiry. To facilitate the labours of the Congress, a programme had been prepared for each section of the questions to be submitted for discussion, and for the section of Judicial Statistics it consists of two parts—viz., 1. Judicial Statistics, properly so called—i.e., the statistics of civil and criminal justice in different countries; 2. Statistics of Real Property and its Burdens.

Professor Leone Levi, one of the secretaries of the session, who has prepared the first part of the programme, briefly explained the purpose and objects of the inquiry, and recommended the collection and publication of all the facts connected with civil and criminal statistics for all countries in such a methodical and comparative manner as to enable the legislator to study with greater profit the laws and institutions of which they are in some sort the results and exponents. The president observed, that owing to the absence of authentic collections of facts, legislation remained open to the reproach of being empiric in its character, and that it could scarcely be ranked among the sciences until it should have adopted, like them, the inductive method of investigation.

Mr Hill Williams, one of the secretaries of the section, read his note upon the second subject confided to this section—viz., the statistics of real property and its burdens. He explained, that at former meetings the Congress had expressed itself strongly in favour of the registration of landed property, and of the systematic collection of facts connected with it, and regretted that, from the absence of a general national map and book of reference, England was not in a position to contribute the materials necessary for a general scheme of statistical inquiries applicable to this question, as specially recommended by the Vienna Congress. He stated the objects of registration to be to increase the security of titles and the value of real property, by facilitating its transfer and encouraging its improvement, and proposed the following general propositions as worthy of support, viz. :—

1. That the establishment of a general land register in every State is highly expedient.
2. That it should be based upon a general survey and map, accompanied by a book of reference, giving for each parcel or close of land the names of owner and occupier, the state of cultivation, and contents.
3. That the map and reference should be revised periodically, so as to represent, as nearly as possible, the actual state of the land itself.

The several sections of the Congress met on Tuesday morning, in the rooms



prepared for them at Somerset House and King's College. In accordance with the course pursued at previous meetings of the Congress, the first business of the sections was the election of their officers. His Royal Highness the Prince Consort, accompanied by the Right Honourable T. Milner Gibson, and attended by the Earl Spencer and Colonel Ponsonby, and the secretaries of the Congress, visited and spent some time in each of the sections.

*First Section—Judicial Statistics.*—Dr Asher proposed Lord Brougham as President of the section, which was received with acclamation, and unanimously adopted.

Colonel Dawson proposed Dr Asher as Foreign Vice-President, who was unanimously elected.

Mr Lumley then proposed the Right Hon. William Napier and Sir W. Page Wood as Vice-Presidents, who were unanimously elected.

On the motion of Mr Commissioner Hill, Mr Samuel Redgrave, Mr Leone Levi, and Mr Hill Williams, were elected English Secretaries, and M. de Koulomzine, Foreign Secretary of the section.

Lord Brougham and Dr Asher undertook the office of Reporters to the Congress.

After a short but highly interesting address by Lord Brougham, Mr Levi made a statement of the proceedings of the previous Congresses in the matter of judicial statistics; and Dr Asher made some observations on the difficulties experienced as to the nomenclature of crimes, for international comparison. Mr Levi then submitted to the meeting the resolutions which were embodied in the programme; and after a discussion, full of interest, in which the foreign delegates took an important part, the resolutions were adopted in the following form:—

1. That the systematic collection and publication of facts relating to the operation of the law and the administration of justice, by a complete system of judicial statistics, would afford most valuable materials whereby to institute wise and permanent legal reforms, and would furnish information of great importance illustrative of the social and moral wants of the people.

2. That judicial statistics should relate to the organization and procedure of all courts of justice and other legal tribunals, whether civil, commercial, ecclesiastical, military, naval, criminal, or of whatever nature, and also to inquests, police, crimes and criminals, punishments, prisons and reformatories, and the results of legal proceedings.

3. That the statistics relating to the organization of courts of justice, as well general as local, should exhibit the number of the courts, with their geographical area, the nature and extent of their jurisdiction, the number, the requisite qualification, mode of appointment, and the tenure of office of the judges, jurors, if any, and the officers of the court; the mode and extent of their remuneration, including the retiring allowances, if any, the fees levied, the costs allowed, number of days and hours such courts, judges, jurors, and officers sat or were employed, with such other information relating to population, taxation, trading, shipping, etc., as may best show the relation of the means afforded for the due administration of justice to the character of different districts and the wants of the people.

4. That the statistics of juries should show the number and description of jurors in the book, the number called during the year for one or more times, the number of days and hours the jurors were employed; the number of trials by jury in civil and criminal cases, distinguishing special juries, the remuneration of juries, the number of jurors who compose the jury, the cases where trial by jury is obligatory, the cases where it is optional, and the cases where, being optional, the parties prefer being tried by the judge; the number of trials by jury in which the juries were unanimous or have given their verdicts by a mere majority, or by some larger proportion; the number of juries discharged, and on what grounds; the number of verdicts set aside, and on what grounds.

The section adjourned at ten o'clock.

*Wednesday*—Section I. was presided over by Lord Brougham, when a paper

was read by Mr Leone Levi, on "Civil and Criminal Statistics," and a discussion ensued, in which Mr Pitt Taylor, Mr T. Chambers, Q.C., and other eminent members of the legal profession, took part.

## SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW. 1

### PROPOSED LAW UNIVERSITY.

At one of the usual fortnightly meetings of this Society, lately held at the Rooms, Waterloo Place, in the absence of Lord Brougham, the chair was occupied by Mr Herbert Broome, Lecturer on Common Law to the Inns of Court. There was a very full attendance of members.

Mr J. N. Higgins read the following paper in reference to a new scheme for a Law University. There may appear to be at first sight a contradiction in the terms which imply that a university may be restricted to one special branch of science, excluding the study of all others. The old notion of a university, and the strict one, no doubt, is, that its objects and concern extend so as to embrace the whole domain of human knowledge; that it includes all science and all literature. Accordingly, we find that in our great national universities there are professorships not only of languages, mathematics, theology, and philosophy—natural, mental, moral, and social—in all their principal branches; but also of jurisprudence, and of *belles lettres*. So great, however, has been the advance and increase in the extent and variety of learning since Lord Bacon mapped out its domain, and enunciated the principles to be adopted in its acquirement, that there is now hardly any great department of it, except that with which *we* are immediately concerned, which has not more or less asserted its independent claims, and individual importance, by the establishment of some corporate body especially devoted to its study and culture. Thus we have incorporated colleges or societies of physicians, surgeons, preceptors, engineers, chemists, actuaries, artists, and so on,—none of them being devoted to the mere cultivation of an art or business as distinguished from its cognate science, but dealing with science itself, and also with its application to the arts and business of life.

It is certainly strange that, in this respect, the course of English jurisprudence, as to the manner of, and opportunity for its cultivation in this country, should have been for some centuries, until recently, entirely retrogressive.

In one of those quaint addresses to the reader, which are to be found prefixed to Coke's Reports, that great lawyer, after minutely describing the functions of the Inns of Chancery and the Inn of Court, such as they discharged in Lord Coke's time, goes on to say, "All these are not far distant from one another, and altogether do make the most famous university for profession of law only, or of any one human science, that is in the world, and advanceth itself above all others, *quantum inter viburna cupressus*. In which houses of Court and Chancery the readings and other exercises of the law, therein continually used, are most excellent and behoofful for attaining to the knowledge of these laws" (3 Coke, xix.). Lord Coke, in the essay from which I have just quoted, very fully describes the course and manner of study pursued by persons intended for the bar in his time, as well as what was required of utter-barristers. A student was first moot-man, who argued readers' cases in an inn of Chancery. After eight years' study as a moot man he might become an utter-barrister, and have the chance himself of then being chosen as a reader in some inn of Chancery. Out of the utter-barristers of twelve years' standing were chosen benchers or ancients, from whom were selected what were called the single and double readers. In some respects, therefore—so far at least as regards organization for the purposes of teaching and a progressive course of study—Lord Coke was justified in speaking of the Inns of Court and Inns of Chancery in his day as a "most famous university," although it was for the study of the law *only*.

I am not now, however, about to enter upon a branch of our subject which has already—and particularly within the last twelve or fifteen years—been

handled very largely. I therefore do not propose to occupy your time by any attempt at tracing the history or the reasons of the decline of legal education in this country. I remember to have read, I think in Lord Campbell's "Life of Lord Somers," that the noble biographer fixes that period as the commencement of the system of private pupillage in barrister's chambers; and points with regret to that fact, as the cause of the anomalous position of our Inns of Court and Chancery in more recent times. Everybody knows, however, that of late years considerable attention has been directed to the subject now under consideration. I believe that one of the first symptoms of a desire on the part of the Inns of Court to revive their proper functions, was an attempt by the Middle Temple, some fifteen or twenty years ago, to appoint a lector to the ancient society of Clifford's Inn, which was said to have been in old times affiliated to the Middle Temple. The Principal and Rules of the former antique body, however, without seriously attempting to dispute the right of the Middle Temple to make the appointment, adopted an effectual, though most hospitable mode of stopping his mouth, by invariably naming the dinner hour as the time for the learned prelection to come off; and I believe upon every occasion on record, the learned lector and his venerable audience agreed unanimously that they might spend their hour in discussing something more palatable than law.

About the year 1845, the subject of legal education was seriously taken in hand by the Inns of Court; and in the year following, a scheme of lectorial instruction and of voluntary examinations was set on foot. Professors were appointed, and the experiment was commenced. Mr Spence lectured to a large class at Lincoln's Inn on Equity. Mr Bower, at the Middle Temple, discoursed on Civil Law and General Jurisprudence. At Gray's Inn, Mr Lewis's lectures on the law of real property, attracted a crowd of students and junior barristers: and there were periodical moots and honour examinations, which were entirely successful, and did much to prepare the way for what has since been accomplished. We know that there is now a council of legal education of all the Inns of Court, and that no student is eligible to be called to the bar who has not either attended one whole year the lectures of two of the readers, or satisfactorily passed a public examination. The examination lasts for part of three days, and is both oral and by printed questions. Studentships have also been founded; and there are certificates of honour, the holders of which take rank in seniority over all other students called on the same day. Five readers (all of them accomplished lawyers) have been appointed—one on constitutional law and legal history, one on equity, one on the law of real property, one on jurisprudence and the civil law, and one on common law. The method of education combines public lectures with instruction by the lecturers in private classes: and I believe that the income of each lecturer depends, to some extent, upon the degree of his success.

If I am not mistaken, the lecturers are also the public examiners. I do not stop now to make any remark upon the peculiar features of this scheme. I am merely stating facts, and endeavouring to discover, as a matter of fact, what is the present condition of legal education in this country. It was generally rumoured a year ago, that there was a great difference of opinion among those who constitute the governing bodies of the Inns of Court, as to the subject of a compulsory examination previous to admission to the bar. The names of distinguished lawyers were freely mentioned as advocates of the *status quo*; and persons of no less eminence in the profession were named as the favourers of the test of a compulsory examination. It is said that, owing to a very small majority, things remain as they are. It is worthy of note, however, as I have already mentioned, that, according to the regulations now in force, no one (except he passes a public examination) can be called to the bar unless he shall have attended one whole year, at the least, the lectures of two of the readers.

Before 1835, any person by mere service under articles, and without an examination, might become an attorney. The body of solicitors established the Incorporated Law Society, and instituted an examination which must be passed by every student previous to admission on the roll of attorneys. Since then,

they have also established lectureships in common law, equity, and conveyancing; and since the year 1835, owing to the untiring exertions of the Council of the Incorporated Law Society, the educational requirements of persons who are desirous of becoming attorneys have been greatly raised. A Bill, moreover, is now before Parliament, providing, amongst other things, for the establishment of a preliminary examination for such students.

In addition to the opportunities afforded by the Inns of Court and the Incorporated Law Society for legal education, there are others which it would be unfair to overlook; Cambridge has its Regius Professor of the Civil Law and Downing Professor of Law.

In Oxford there are the Vinerian Professor of Common Law, the Chichele Professor of International Law, and the Regius Professor of Civil Law.

The University of London has its examination in law and the principles of legislation; and there is also the Gresham Law Lectureship.

From what has been already stated it will be seen that something has been done within the last few years, and that there are now at work numerous educational agencies touching the science of jurisprudence and the legal profession. I desire not to depreciate them; but, on the contrary, to give to all of them the honour they deserve. But the facts which I have stated are sufficient to raise several questions of an important character in reference to the particular topic now under consideration:—

1st, Is there any reason why all these valuable agencies should remain disconnected without any general plan or harmonious action?

2dly, Is the sum total of what is, or can be, accomplished by them all, sufficient for the requirements of the country, or even of the legal profession?

I shall consider the second question first. What, then, are the requirements of the country and of the profession in respect of legal education? Upon a casual glance, they might appear to be limited, first, to the supply of a learned judiciary; secondly, of a learned and well-trained body of advocates; and thirdly, of a respectable and educated body of persons for the discharge of the more detailed and minute duties connected with the administration of the law. If this assumption were correct, I should hardly have felt justified in addressing the Society upon the present subject; but the assumption in fact is very incorrect. Although the legal profession—using the term in its narrowest sense—may be said to include only the three classes of persons which I have enumerated, yet it would be a mistake to assume that, putting these classes of persons aside, the country has no further necessity of the services of a considerable number of persons who have had the advantage of a systematic legal education. I would allude first and foremost to the great body of our unpaid magistracy. England, I believe, is the only country in Europe in which the law is to any considerable extent administered by persons who never received any education in the law. I am far from denying that the rude equity generally administered by country justices is not generally fair enough in its results. Perhaps, that it is so, we are more indebted to a free and watchful press, and to the very general feeling of respect for law on the one hand, and for private rights on the other, which exist in this country, than to the fact that the magistrates are almost universally ignorant of the law which they are called upon to administer. A recent elaborate and valuable work (*"Summary of the Duties of a Justice of the Peace out of Sessions."* By Thos. J. Arnold, Esq., one of the Metropolitan Magistrates), devoted to the duties of a justice of the peace out of sessions, I have no doubt has already had the effect of raising an alarm in the breasts of many of those worthy gentlemen, as it ought amongst the entire community. The vast number of things of a disagreeable and dangerous character which a justice of the peace out of sessions has a right to attempt, is truly startling. The Acts of Parliament intended specially to relate to his jurisdiction, or to guide or interfere with it, are well nigh greater than any man could number; while the law of evidence, to which he is supposed to pay respect, is the same as that which sometimes taxes the ingenuity of the subtlest minds and of the most learned lawyers.

## Digest of Decisions.

### COURT OF SESSION.

#### FIRST DIVISION.

FORRESTER *et al.* v. THE PROVOST, MAGISTRATES, AND TOWN COUNCIL OF EDINBURGH.—June 26.

REID *et al.* v. THE MAGISTRATES AND TOWN COUNCIL OF EDINBURGH.

#### *Mortification—Obligation.*

The first of the two actions was one at the instance of certain members of the Town Council against others of that body, concluding to have it found and declared that the sum of L.17,671, 9s. 6d., received by the defenders from the North British Railway Company, under the Act 9 and 10 Vict., c. 74, with interest, is held by the defenders for the erection of a new church within the parish of Trinity College, or as near thereto as conveniently may be, with equal convenience of access and accommodation as the old church, and of the same style and model; and that the defenders should be held bound to fulfil the purposes of the trust, and erect a new church in accordance with these directions; and that the defenders ought to be interdicted from employing the funds in any other way. This contention was rested by the pursuers on the Act 9 and 10 Vict., c. 74, and the circumstances in which that Act was passed. It appeared that the Trinity College Church was part of the subjects which were held by the Magistrates for a great length of time, under a charter of 1587, which gave them right to this church, and other subjects, in its neighbourhood. The building was used as a church, so far as it was used at all, from that time. In 1846, the Act referred to was passed. The North British Railway Company desired to obtain possession of the subjects which were in this locality. The Legislature provided that it should not be lawful for the Railway Company to make any alterations, etc., until "they shall have agreed with" the defenders "on a plan for the removal and rebuilding, at the expense of the company, on another site, either within the said parish of Trinity College, or as near thereto as conveniently may be, of a new church, with equal convenience of access and accommodation to that already existing in the said parish; and that, in such agreement, provision shall be made for the adoption of the same style and model with the existing church," submitting any difference of opinion as to the plan or the site to the arbitration of the Sheriff, and declaring that "it shall be competent to the Railway Company to offer, and the said Magistrates and Town Council are hereby authorized to accept of, a sum of money as compensation for the said church, and in lieu of the foregoing obligation." The Lord Ordinary decided that the Magistrates were bound to apply the whole fund in building a church of the same style and model as the original church. The Lord President, with whom Lords Curriehill and Deas concurred, thought that the action was not so laid as to enable the Court to decide what should be done

with any surplus that might remain after building a church in terms of the Act of Parliament. He was not prepared, however, to affirm that any length of usage could sanction a diversion of charitable funds from the purposes contemplated by the donor. Lord Ivory differed from the view adopted by the Lord President. The action at the instance of the beneficiaries for declaration of the trust was by far the most important of the actions before the Court. The grant of the church in favour of the hospital was a grant of the mere buildings, which were to be used for secular purposes. The Catholic clergy had been ousted, and there was no provision for the substitution of Protestant clergy. The grant, therefore, was not for any ecclesiastical purpose. It was true the fabric of the former church remained, but it was intended for the purposes of the hospital, and had never been legally diverted therefrom. The first dealing with the church after the grant was in 1587, when the city was divided into four parishes, of which Trinity College was made one. But the city had no right to the church except under the trust title, and no length of contrary use could change that title. So matters continued till the Railway Act was passed, conferring on the Railway Company compulsory powers of purchase. That Act did not, and could not, affect the right of the city in the Trinity College Church. The Town Council were bound to apply the price obtained for the church to the uses which were most beneficial to the charity, whether by increasing the number of the pensioners, or increasing the payments made to them. If the church were necessary to the hospital, then the Town Council were bound to erect a church large enough for that purpose, but the surplus ought to go into the general funds of the charity.

HERITORS OF BRECHIN v. PRESBYTERY OF DO.—*June 27.*

*Mandate of Counsel—Glebe.*

In the year 1716 a glebe was designed to the second minister of Brechin. In the year 1856 the first minister was found entitled to a glebe, and the leading object of the present action is to reduce the designation of 1716, and to have the lands then designed, or the lands excambed for them, substituted for those designed in 1856. The case came before the First Division on a reclaiming note, and was argued at great length, both orally and in writing. At the advising of the case it appeared there was some difficulty about the facts, and the defenders' counsel stated that they had no authority to renounce probation. The Lord President said that the renouncing or not renouncing probation was a matter wholly within the control of counsel, just as the calling or not calling further witnesses at a jury trial. The counsel's gown was his mandate for dealing with the matter, and the Court could recognise no interference with his prerogative in so acting. The case was delayed to allow a minute to be given in upon the facts. Judgment was afterwards given for the defenders on the merits, the Court being unanimously of opinion that no case had been made out for disturbing the former designation.

M'GREGOR v. M'GREGOR.—*June 27.*

*Bill of Exchange—Sexennial Prescription.*

This was a question as to the sexennial prescription. The original

debtor in the bills was the late Robert M'Gregor, who died in 1853. The bills were three in number, granted in 1849, and the six years had run on all of them by November 1856. The original debtor died before the six years had run, and was succeeded by his sister Helen. She did not appear to have acted actively as executrix, but gave authority to Mr Fleming, banker, Grantown, "to act for me, and on my behalf, in all matters connected with the affairs of the deceased." That authority was granted 24th May 1853, a few days after the death of the original debtor. Under that authority Fleming acted, got in claims of the deceased, and made payments to creditors, and, among others, got in claims from the pursuer on these bills, and made payments on them. On 6th April 1857, after the six years had run, Fleming wrote the following letter to the pursuer's agent:—"On looking into Mr M'Gregor's claim upon the late Delavorar's estate, I find that he has been paid up the whole claim, except L.93. L.50 of that balance has since been paid by another obligant, and arrestments having been used in M'Gregor's hands, I must decline giving up the documents and vouchers lodged. The arrestments were afterwards withdrawn. In June 1857 Fleming wrote to the pursuer's agent that nothing was due his client, who, on the contrary, had been prepaid. In February 1858 the present action was raised, being laid both on the debt and on the prescribed bills. It was met by the plea of prescription, which was applicable to this extent, that six years had run on the bills, and that the pursuer must establish the debts by the writ or oath of the debtor. The Lord Ordinary found that the pursuer had produced sufficient written evidence to elude the prescription; but the Court altered, holding that the acknowledgment of Mr Fleming was equivalent to that of the executrix.

*LENY v. LENY.—June 29.*

*Entail—Direction to Trustees.*

By the last will and testament of the late Dr Robert Leny, he declared as to the residue of his estate: "I bequeath to my nephew, Lieutenant James Macalpine (now Mr M'A. Leny of Dalswinton), and to his heirs for ever, the whole of my property, whether real or personal." But the bequest was made under the condition that the proceeds should be employed by his trustees in the purchase of a landed estate in Scotland; and he stated his desire to be, "that the said estate, when purchased, shall be made over by a deed of entail, according to the formalities necessary in such cases in Scotland, to be enjoyed by my said nephew, Lieutenant James M'Alpine, and his lawful heirs for ever, in regular succession." The trustees followed out these instructions by executing a deed of entail, "to and in favour of the said James M'Alpine Leny, whom failing, to his lawful heirs whomsoever, in regular succession, declaring that so often as the succession of the said lands and estate shall open to and devolve upon females, the eldest heir female, and the heir female of her body, shall exclude heirs portioners," etc. The questions raised by Mr M'A. Leny are, whether this was a deed of entail in terms of Dr Leny's sentiment; and whether he is not entitled to hold the lands in fee-simple, as not being effectually entailed. In conformity with the opinions of the whole Court, their Lordships decided that it was incompetent for the trustees to insert in the entail an exclusion of heirs por-

tioners, such an exclusion not being directed by the trust-deed. Further, they held that a conveyance to the entailor and his heirs whatsoever has no legal import or effect at all, and leaves him *dominus* of his estate as he was before; that a conveyance to another, and his heirs whatsoever, is of no other import or effect than a conveyance to the donee himself; that such a conveyance is not, in the sense of law, a destination, or a substitution of heirs, or a tailzie; and, therefore, that it cannot be effected with irritant and resolute clauses under the authority of the Act 1685.

WILSON v. BARTHOLOMEW.—July 7.

*Process—Suspension and Interdict.*

This was an appeal from an interim Interlocutor by the Sheriff of Lanarkshire, in a mining case, which was alleged to have inverted the state of possession of the subjects. The complainer, having refused to implement the order, was charged thereon and threatened with imprisonment. He brought a suspension of this charge, which was refused as incompetent, in respect of 16 and 17 Vict., cap. 80, which prohibits review of interdict decrees by suspension or reduction. He then brought a suspension and interdict to prevent the charge being put in execution. The competency of this process also was objected to; but the majority of the Court held that this was not rendered incompetent under the statute, as it did not *directly* bring the interlocutor under review, whatever its ultimate effect might be,—Lord Ivory remarking, that although an interim decree could not be brought under review at the time, that still all interlocutors in a cause could be reviewed at the end of it, which, under an interim decree of this kind, which proposed instantly to invert the state of possession, might be quite useless, because the evil complained of would be done. Lord Deas would have been happy to concur if he could, but he did not think they could call in question the wisdom of the Legislature, or consider whether this Act was right or wrong in excluding review; but if the interdict now sought did not bring this interim decree under review, it was difficult to see anything else it could do or was intended to do. The Court remitted to the Lord Ordinary to pass the note and proceed.

SMALL v. WELCH.—July 9.

*Poor Law—Removal.*

This case came before the Court in the shape of a claim for aliment against the Inspector of Cupar, by a person who was a fit object for relief, presently residing in that parish. The Inspector replied, he had offered to remove her to Croy, which parish had admitted its liability for her support. The pauper says she is not bound to remove, but she does not object to being removed,—that is, against her will. The 70th section of the Poor-law Act provides, that wherever a pauper is residing he is entitled to relief from the parish of his residence till the parish really liable for his support is ascertained, so that no one shall starve. The pauper, it is further provided, shall give all facilities for ascertaining the parish of his settlement. The Lord President thought the parish of settlement had been ascertained. It was not enough for the pauper to say, "It has not been ascertained to my satisfaction." Were that sufficient, an unreasonable pauper, and there were such, might never be



satisfied. It was not necessary that a proof should be led if the parish admitted its own liability. The question truly was, whether, if a pauper liable to be removed refused to remove, she was entitled to claim relief from the parish of her residence? The Court thought she was not. It must be distinctly understood, however, that it would not do for an inspector merely to say to a pauper, "Here is money. You must remove yourself to such a parish." It must be seen to by him that proper conveyances can be obtained.

WEBSTER v. LYELL.—July 9.

*Landlord and Tenant—Delivery.*

The question in this case was, whether the tenant was entitled to throw up the lease on the grounds referred in the following opinion of the Court. The Lord President said, the advocator disputes liability for the rent on two grounds,—1st, that the house was not in good tenantable condition; 2d, that part of the premises let were withheld from him. As to the first ground, the Court were of opinion that it was not well founded. The fourth stipulation of the agreement was, that the subjects are to be received by the tenant as in good tenantable order and condition. No doubt the advocator said he had not seen the premises when he entered into the agreement. But that was his own fault. As to the second ground of defence, it appeared that the rooms of which the advocator did not obtain possession on 15th May 1857 were the charter-room, two small rooms containing spare napery and curiosities, and a room above the museum in the garden containing chemical apparatus, etc. As to the first, a temporary tenant could hardly claim possession of it. The other three, the advocator was told by Wilkie, who had charge of the house, were not in use to be let, and that he had no authority to give possession of them. He did not absolutely refuse possession, and it lay on the advocator to have communicated with the landlord's factor in regard to these rooms. Not having done so, he was not entitled to throw up the lease, and was therefore liable for the rent.

## SECOND DIVISION.

HARVEY v. HARVEY.—June 22.

*Trust—Power—Approbate and Reprobate.*

This was an action brought by Henry Lee Harvey, Esq., and Miss Catherine Lee Harvey, two of the younger children of Colonel and Mrs Lee Harvey of Castlesemple, to have their rights under the settlements of their father and mother ascertained. It appeared that in 1839 Colonel and Mrs Harvey executed a bond of provision, the object of which was to secure L.20,000 to each of their younger children; the residue of their fortune being to descend to their eldest son. Their property was considerable, consisting of the entailed estate of Castlesemple, in Renfrewshire; the estate of Mousewald, in Dumfriesshire, held in fee simple; estates in the West Indies; and other property. The provisions settled on the younger children were declared to be subject to abatement of any sums which they might receive under their father's and mother's contract of marriage, a bond executed over the rents of the entailed

estate, and a security over a small estate in Renfrewshire, called Peockstone, which Colonel and Mrs Harvey had purchased, but kept up an heritable debt secured upon it by assignation; and which sums amounted to about L.25,000. By codicils executed at different times, the provisions to the younger children were considerably reduced in amount, in consequence of the depreciation in West India property. Colonel Harvey died in 1849, Mrs Harvey in 1853, and John Rae Lee Harvey in 1854; and James Octavius succeeded to the entailed estates. The principal question involved in the present action was, whether the younger children could take the marriage fund, the entail provision, and the Peockstone security, independently of the bond of provision of 1839, and at the same time claim benefit under it; or whether it was not a condition of the bond of provision of 1839, that the whole funds should be under the restrictions of that deed. There was also a point raised, as to the powers of the pursuers to settle their provisions by will after their deaths, in the event of their leaving no children. The Lord Ordinary (Neaves) held that it was a condition of the bond of provision, that the whole money should be brought under it; and that unless the pursuers consented to this, they could not claim benefit under it. He found also that the pursuers were entitled to test on their provisions. The Lord Justice-Clerk, in an elaborate judgment, commented on the deed and codicils, and arrived at the conclusion that the Lord Ordinary's interlocutor was correct, except as to the matter of testing, which he held could not in present circumstances be competently raised. The Court adhered, with that variation.

**RAMSAY v. RAMSAY AND THE PRINCIPAL AND PROFESSORS OF THE  
UNITED COLLEGES OF ST ANDREWS.—June 23.**

*Trust—Election Law.*

By the terms of the deed founding the three Ramsay bursaries in the United Colleges of St Salvator and St Leonard, the patron for the time being is entitled, on a vacancy occurring, to present a number of candidates bearing certain names to the Principal and Professors, who are to make examination of these candidates in literature, and to attest which of them is the ablest and fittest; and the person thus attested is thereupon to be presented to the bursary. One of the Ramsay bursaries fell vacant in 1854, and the pursuer of this action, along with Alexander Ramsay, then residing in Forfar, and another, were selected to compete. Alexander Ramsay of Forfar was certified by the examiners as the fittest to receive the bursary, and in consequence was presented by the patron. After holding the bursary for several years, his right to do so was challenged, on the ground that when appointed he was beyond the proper age; and the Court of Session, in 1859, pronounced this objection to be well founded. He lost, in consequence, all future benefit from the bursary. The pursuer alleges that he was the second best at the examination of 1854; and he asked for a judgment to the effect that the Principal and Professors should be declared bound to give a certificate to that effect. Upon getting that certificate, he proposed that the patron should be ordained to present him, and that he should be allowed to enjoy the bursary for the remaining years which it has to run. The Court dismissed the action, holding that the pursuer had no right to obtain

the bursary, and that the only course open to the Colleges was now to proceed anew with the appointment of a bursar as upon an ordinary vacancy.

WHITE v. WHITE *et al.*—June 28.

*Trust—Succession—Heritable and Moveable.*

The late Mr Adam White, of Fens, merchant in Leith, left a trust-settlement, in which he directed his trustees to set apart for his five daughters, and among others, for his daughter Eliza White, a principal sum of L.7000, increased by codicil to L.10,000, free of legacy duty. These sums, so far as not advanced to any of the daughters, were to be "lent out and secured by my said trustees, on good and undoubted security, *heritable or personal*, and the rights in security and writs thereafter shall be taken in the case of my unmarried daughter to and in favour of my said trustees, in trust for behoof of my said unmarried daughter in liferent, for her liferent use only, and her heirs whomsoever in fee." After Mr White's death, in 1843, the trustees invested the sum of L.10,000 for behoof of Miss Eliza White, on heritable security. Miss Eliza White died in 1859, unmarried. A question has arisen between her heirs-at-law and next of kin as to her succession: the heir-at-law contending that the property, being invested in heritable security, was heritable; while the next of kin maintained that under the trust-deed it was moveable, descending after her liferent to the nearest of kin. The Lord Ordinary (Neaves) decided in favour of the next of kin. The Lord Justice-Clerk (with whom the other Judges concurred) agreed with the Lord Ordinary. The provisions were not legacies of special subjects, but a general sum to arise from the realization of a mixed personal estate. The power to lend the money on heritable security was only given to enable the trustees to invest it safely. The question was, whether the succession as left by the testator, or the nature of the security taken by the trustees, was to regulate the succession. There was obviously only one answer. The nature of the subject, as left by the testator, must undoubtedly decide. Administrators had no such powers of changing the succession.

*Ap., J. EWING AND CO., IN WALLACE'S SEQ.*—June 29.

*Partnership—Liability—Diligence.*

The question was, whether the creditors of a firm can, by using inhibition against a partner, in the dependence of an action against the firm, obtain a preference over the price of heritable property vested in him as an individual. The pursuers, formerly merchants in Glasgow, having raised an action against James Wallace, junior, and Company, cotton-spinners, Glasgow, in the Sheriff Court at Glasgow, raised letters of inhibition against the Company, and James Wallace, junior, an individual partner, who was proprietor of certain heritable property, which has realized the sum of L.2941, 8s. 9d. J. Wallace and Co., and J. Wallace as an individual, having become bankrupt, the appellants, Ewing and Co., claimed in the sequestration a preference over the whole price realized from the heritable subjects. This claim the trustees rejected. The Lord Ordinary sustained the claim, and the Court adhered. Lord Wood observed that it was settled that a decree in an action against a

company was a decree against the partners, and that thus a party, not named in the action, could be charged on the decree. On the same principle it had been settled, that when a bill of exchange by a firm had been protested, the partners could be charged. There was no reason why, if diligence against the personal estate was competent, diligence against the heritable should not be competent; or why, when diligence in execution was competent, diligence on the dependence in security should not be competent.

[IN EXCHEQUER.]

LORD ADVOCATE *v.* M'ILWHAM'S TRS.—July 13.

*Residue Duty—Heritable or Moveable.*

Under the trust-deed of the late J. M'Ilwham of Carnbroe, an option was left to the trustor's eldest son, James M'Ilwham, of taking the estate of Carnbroe at a valuation of L.30,000, instead of his share of the residue of the trust-estate. James M'Ilwham availed himself of the option. The question is, whether, in the circumstances, the heritable estate of Carnbroe is subject to residue duty? The Lord Ordinary, in Exchequer, assailed the defenders, and the Court adhered, holding that since Carnbroe had come into the hands of the eldest son as heritage, it did not fall under the Act as to legacy duty.

*M. P., DICK v. HILLON, et al.*—July 13.

*Trust—Vesting—Inhibition or Substitution.*

By the settlement of the late Mr W. Robertson, residing at Bankhead, near Lanark, and his wife, their trustees were empowered, on the decease of either, to divide one half of a certain fund among their children; to pay the annual rent of the other half to the survivor of the spouses till his or her death, and then to divide it also among the "said children," with the usual clause, "*si sine liberis*." Two children alone survived both parents. Two children, Lillias and Margaret, survived their father, but predeceased their mother, leaving a will. The question is, whether the shares of Lillias and Margaret had vested in them, so that they were able to test. The Lord Ordinary (Neaves) held that the shares had vested; but the Court reversed his interlocutor, holding that the presumption of law, in money questions, was in favour of conditional institution rather than substitution, and that therefore the shares had not vested in Lillias and Margaret Robertson.

*Pet., DONALDSON v. FINDLAY, BANNATYNE, AND Co.*—July 17.

*Bond of Caution.*

Professor Donaldson having succeeded in his action against Findlay, Bannatyne, and Co., was allowed execution, pending appeal, on his finding "caution in common form to repeat the sums recovered in the event of the interlocutor appealed against being reversed." On this he presented last week the present petition, craving the Court to "authorize a bond of the British Guarantee Association to be accepted and taken, instead of a bond of caution by a private individual, in implement of the condition as to caution." The caution required was for L.10,000. It appeared that the British Guarantee Association was originally estab-

lished at Edinburgh for guaranteeing the integrity of managers, etc., and "to transact such other description of guaranteeing transactions" as the directors for the time being should think fit. In 1854 it obtained a new Act, in the sixth section of which its powers and objects were of new described, and extended to guarantee for officers under Courts of Justice, etc., the said section containing a general power to the directors, such as they had under their previous Act, to enter on such other guarantee transactions as they should deem expedient. The Act authorized Courts of Justice to accept the Association's guarantee, in lieu of the ordinary caution, for its officers; and under this authority the Court, on the former occasion, had taken their bond for a *curator bonis*. In the present case the directors had authorized their manager to grant the bond, without passing a resolution to include this new class of cases in their business. The Lord Justice-Clerk said the Court could not authorize the bond to be taken. From the description of the proper business of the Association, contained both in its old and new Acts, the proposed bond was clearly not within it. Its proper business was guaranteeing persons in positions of trust. The directors had power to extend its business to other classes of guarantee business; but that was a power which they must exercise by passing a formal resolution to extend the business to a new class of cases. He had no idea that under the 6th section they could, without such a resolution, bind the Company for any particular risk. The other Judges concurred, Lord Cowan remarking that it was enough for the Court that there was a doubt as to the power of the directors to bind the Company.

SINCLAIR v. SMITH.—July 17.

*Jurisdiction—Forum Contractus—Forum Originis.*

This was an action of damages for breach of promise of marriage. The courtship had been in Scotland; but the defender, a native of Scotland, had afterwards gone to reside in England, and had married an English lady. While on a temporary visit to Scotland, the summons was served upon him, to which he pleaded no jurisdiction, in respect that he had abandoned his Scottish domicile, and had not been resident forty days since his return. The facts were admitted, but reliance was had on the doctrines of jurisdiction, *ratione contractus* and *ratione delicti*. The Lord Justice-Clerk, after stating the facts of the case, referred to the two grounds on which the pursuer maintained the jurisdiction—(1) that the defender was a native of Scotland, and was in this country when the summons was executed against him; and (2) that Scotland was the *locus contractus*, and that the defender was within the territory when the summons was executed. Both parties appear to think that there was some mysterious efficacy in the fact of the citation having been personal. The real fact of importance was the defender's presence within the territory. The second ground of the pursuer's case—viz., the facts that the contract was made in Scotland, and that the defender was in the territory when cited in competent form—was sufficient for a judgment in his favour. It was, therefore, unnecessary to examine whether the Scottish origin of the defender, when taken in connection with his presence in the territory at the date of citation, was sufficient to found jurisdiction. His Lordship could not agree with the Lord Ordinary in his views as to the judgment.

of the House of Lords in *Grant v. Peddie*, on the question of *forum originis*. Then there was nothing better settled than that the tribunals of a country where a contract is perfected have jurisdiction to enforce it, if the person against whom it is sought to be enforced is temporarily present in the territory. It was true that this doctrine did not prevail in France; and in England, personal presence was of itself sufficient; but by the Roman law, the principles of which had been adopted in our country as in the other nations of Europe, the *locus contractus* was held to confer jurisdiction, under the qualification that the party to be sued must be present in the territory. Huber and Voet, among the civilians, and Lord Kames and Erskine, among Scottish jurists, were clear on this point. But the defender also argued that the doctrine did not apply, as the pursuer and defender were not in reality parties to a contract; that the action was not really for breach of contract, but rather for deceit. This was a startling argument. Though the contract was completed by mere consent, it was not the less a contract. The law would not enforce fulfilment; but this was on grounds of public policy, and did not derogate from the authority of the contract. The plea of want of jurisdiction must therefore be repelled. The other Judges concurred, but could not agree with the Lord Ordinary in his views as to the reversal of *Grant v. Peddie* giving a deathblow to the doctrine of the *forum originis*, when taken as one element for judgment along with others. Lord Wood was inclined to think it was sufficient in combination with either of the other elements.

*Pet., STUART et al. v. LADY ELIZABETH MOORE.*—July 20.

*Custody of Pupil—Nobile Officium.*

The present Marquis of Bute, who is aged thirteen, was born in Scotland, the heir of estates in England, Wales, and Scotland, yielding in all a yearly net revenue of L.93,000. On the death of the late Marquis in 1848, Lord James Stuart, the tutor-at-law, presented an application to the Court of Chancery for the appointment of the Marchioness of Bute to be the guardian of her son. She was appointed on the 10th May 1848, and resided from that period till her death, in December 1859, principally in Scotland, and latterly at Mount-Stuart in Bute, with her son, the young Marquis. Lord James Stuart predeceased her. On her death, a recommendation was found in her will to the effect that Lady Elizabeth Moore, the respondent (a daughter of the Earl of Mountcashel), should be appointed as joint guardian along with the petitioner, General Stuart, and another gentleman, who is abroad, and who did not accept the offer. The appointment was made by the Court of Chancery, while the Marquis, with Lady Elizabeth, were residing in Scotland at Mount-Stuart. At first the two guardians agreed as to the management and education of the Marquis; but after a short time they began to disagree. The General wished that the boy should be sent first to a private school, and then to Eton; Lady Elizabeth thought it best that he should remain under her care, educated by a tutor, until he should be old enough to be sent to a public school, where he would be accompanied by his tutor. She brought him up to England at the request of the General; but after some time, suddenly (as the petitioner alleges, by night) departed for Scotland, taking the Marquis with her. The Court of Chancery there-

upon removed her from her guardianship, gave the sole guardianship to the General, and ordered her to give up the boy to him. She refuses to do so, and states that the boy objects to go to the General, or to live with him; and maintains that he is a Scotsman, and subject to the jurisdiction of the Scotch Courts, and not of the Court of Chancery. Appearance was also made for the tutor-at-law, Colonel Stuart, who concurred in the prayer of the petition. The Lord Justice-Clerk delivered an elaborate judgment, the result of which was that the Court considered they had not all the materials before them necessary for the decision of the case. The Court were also of opinion that the application ought to have been made by the tutor-at-law. In the meantime, consideration of the petition was deferred till November; and the petitioner must bear in mind, that if any attempt were made to remove the pupil out of the jurisdiction *pendente processu*, application might be made to the Court for interdict.

## English Cases.

**WILL.—Domicil.**—The testamentary law of the domicile at the time of death does not govern the will of a married woman made in execution of a power. *H.*, by his will, gave a certain sum to trustees, upon trust to pay the dividends, etc., to *S. E. A.* for life, to her separate use, and after her decease to pay the dividends thereof to any husband of hers who should be living at her death, for his life, in case she should by her last will, to be signed and published in the presence of two credible witnesses, notwithstanding coverture, so direct and appoint. *Sophia E. Alexander* signed and published her will, in pursuance of the said power, on the 3d September 1831; whereof she appointed her husband, *Boyd Alexander*, sole executor. At the time of making the will she was domiciled in England; but at the time of her death, October 19, 1859, she was domiciled in Scotland. *Sir C. Cresswell*: The only question is with respect to a will of a married woman in execution of a power. This gives me an opportunity of correcting what I said on this point in *Crookenden v. Fuller*, 8 W. R. 49. In that case it was argued that the law of a domicile did not apply to a will executed in pursuance of a power. I thought it did; but I have since ascertained that the opinion I there expressed was erroneous, being contrary to that given by the Judicial Committee of the Privy Council in *Jatnall v. Hankey*, 2 Moore P. C. 342.—(*In the goods of S. E. Alexander*, 8 W. R. 451.)

**BANKRUPTCY.—Contingent Debt.**—A bankrupt, by his marriage settlement in February 1817, covenanted to pay L.10,000 to be settled upon trust for himself for life, with remainder to his wife for life, with remainder for the children of the marriage, and thereby agreed to enter into a bond with the trustees to secure L.10,000, of which bond the trustees should stand possessed upon trust, during the life of the bankrupt, or until he should become bankrupt or insolvent, to permit him to retain the said sum in his hands, and upon payment thereof to hold the same upon the trusts therein mentioned. A bond was executed to secure the payment of L.10,000, and interest, in August 1817. There were children of the marriage, who afterwards attained twenty-one. The sum remained in the hands of the obligor till he became bankrupt in 1836, and in the same year the trustees proved for the amount, and the bankrupt swore that he was solvent at the time he entered into the bond. The matter came before

the commissioners in 1827, who expunged the proof. The bankrupt obtained his certificate, and died in 1830. New trustees of the settlement were appointed in 1845, and in 1860 they tendered a proof on behalf of those interested under the settlement for the L.10,000. A petition was presented, and the commissioner rejected the proof, considering that the matter had been settled by the commissioners in 1827, and could not now be re-opened. *Held* (on appeal), that a valuation of the sum to be payable on the death of the bankrupt would have been provable as a contingent debt under the bankruptcy, and that, notwithstanding the lapse of time, the trustees were now entitled to prove for the whole sum of L.10,000.—(*Ex parte Boddam*, 8 W. R. 457.)

**LEASE.**—*Concealment in Inception of Contract.*—E. and R. agreed to take from C. a lease of a house (No. 2), the walls of which were cracked, and eighteen inches out of the perpendicular. Certain repairs were done by C., according to the specification of E. and R. E. and R., on taking possession, were told by the district surveyor that the walls were unsafe; they, however, did not have the foundations examined, and continued in possession until told by the same surveyor, that, owing to certain operations in repairing the adjoining house (No. 1), it was no longer safe to remain in No. 2. They then left No. 2, and returned the keys, and sent a cheque for rent due. C. returned both the keys and the cheque, and tendered a lease, which E. and R. refused to execute. The Court decreed specific performance. *Stuart, V.-C.*: What the defendants relied upon was, that the plaintiff had been guilty of a studied concealment of certain defects known to him, but not communicated to them; but this case was entirely free from anything of that kind. The defects consisted of certain cracks in the walls, and the inclination of the walls eighteen inches from the perpendicular. These were defects sufficient to arouse the vigilance of any one intending to become lessee, and to make him see that it was necessary a great deal should be done before the house could be safely inhabited. Now, if the case rested upon the state of things at the time when the agreement was made, it was wholly destitute of suppression of the truth, or suggestion of what was false on the part of the plaintiff, except as to what was mere matter of opinion. The cause of the cracks, without an examination of the foundations, could not be accurately or perfectly ascertained. The defendant's own evidence showed that it was impossible the plaintiff could have concealed the knowledge of that which the surveyor himself had not ascertained, and did not know existed, until that examination was made which the defendants, if they had been persons of reasonable vigilance, would have taken care to have seen done before they bound themselves by an agreement for a lease.—(*Cook v. Waugh*, 8 W. R. 458.)

**MASTER AND SERVANT.**—*Agreement.*—B. agreed to serve C. as a commercial traveller, "to be binding between the parties for twelve months certain from the date thereof, and continue from time to time until three months' notice in writing be given by either party to determine the same." The service was held to be determinable by a three months' notice expiring at the end of the first year.—(*Brown v. Symons*, 2 L. T. Rep. N. S. 323.)

**LANDS CLAUSES CONSOLIDATION ACT, 1845.**—*House.*—The term "house," in sec. 92 of the Lands Clauses Consolidation Act, includes everything that would pass under an ordinary conveyance of a house; and where a house had attached to it a shrubbery and a series of gardens, separated by walls, but all connected by a gravel walk passing through the dividing walls,—*Held*, that the garden farthest from the house, and enclosed at a more recent period than the others, was part of the house within the meaning of the Act; so that a railway company could not take it without taking the whole house. *Wood, V.-C.*, without calling for a reply, said that the case was concluded by authority. In *Grosvenor v. The Hampstead Junction Railway Company*, 1 De G. & Jo. 446, Lord Justice Turner observed:—"I know of no means by which we can interpret the word 'house' in this section, except by a reference to the legal construction put upon that word in other instruments. I take, therefore, the question to



be, What would pass under conveyance of the house?" So that the term "house" was to be construed in the fullest sense, as including everything that would pass under that term. In this case the shrubbery and series of gardens were all connected by doors, and upon the evidence it was beyond dispute that the land in question was a garden in the strictest sense of the term. It had been attached to the dwelling-house for forty-nine years, and taken out of the adjoining lawn by running up a hedge; fig-trees and vines were planted on the walls, and apple-trees and currant-bushes were growing in it; a gravel path from the house running through and connecting the whole series of gardens. Moreover, the defendants themselves had described it in their book of reference as a garden.—(*Hewson v. The London and South-Western Railway Company*, 8 W. R. 467.)

**JOINT STOCK COMPANY.**—*Register.*—M., a judgment creditor of defendants, placed a sum of money in the hands of D., a married woman, who, representing herself to be a widow, and in an assumed name, purchased some of the stock of the defendants, and was registered as a proprietor by her assumed name; afterwards, at M.'s request, D. sold the stock to the plaintiffs, and the shares were registered in their names. M. became insolvent, and the defendants, finding D. had only purchased for M., struck the plaintiffs' names off the register of shareholders, and substituted the name of M.'s assignee. *Held*, that under the circumstances, the company had no right to remove the plaintiffs' names from the register of shareholders. Cockburn, C. J.: The plaintiffs have clearly an equitable title to be placed on the register; they had no legal title, but the company having supplied that defect in their title by placing their names on the register, can they, under these circumstances, remove them? If the company could lawfully remove them, then it comes to this, that if the company find a flaw in the legal title of any shareholder, they can at their own option strike his name off the register, and appropriate his shares and dividends to their own use.—(*Ward v. The South-Eastern Railway Company*, 8 W. R. 468.)

**BILL OF EXCHANGE.**—*Cheque.*—A cheque is a negotiable instrument; that is to say, the holder of it by indorsement may sue the indorser. In *Keene v. Beard*, 2 L. T. Rep. N. S. 240, a cheque was drawn by B. payable to C., who indorsed it to D., who, on its being presented and dishonoured, brought an action against C. for the amount. It was held, after very elaborate argument, that the action would lie. Byles, J.: I conceive that a cheque is in the nature of an inland bill of exchange, and has nearly all the incidents of ordinary bills of exchange. In one respect a cheque differs from a bill of exchange, for it is in the nature of an appropriation of money in the banker's hands for the purpose of discharging a liability of the drawer to a third person; it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange. Even the notes and bonds of foreign princes and states are all negotiable instruments in this country, and persons who take them for value are entitled to render them available. That seems to be so clear upon the decisions, that I think it would be impossible to hold that cheques are not in at least an equally favourable position; and to me it is clear that a cheque is, in fact, in the class of an ordinary bill of exchange; and if so, why cannot it be indorsed? Since the indorsement—that is, an indorsement *animo endorandi*—must be proved (*Wayman v. Bend*, 1 Camp. 174), no inconvenience can ensue from our holding this. In Story on Promissory Notes, sec. 132, it is laid down: "Although a note payable to bearer is transferable by mere delivery, it may also be transferred by indorsement of the payee, or of any other subsequent holder." It is very true, that when a man's name is written on the back of an instrument without the intention to indorse, and so make himself liable upon it, he is not so liable; and so in the case of a bank-note, a party who writes his name on the back is not liable on it if he wrote without intending to indorse. The writing must always be done *animo endorandi*, in order to make it effectual to bind the indorser.

**SLANDER.—Privileged Communication.**—B., a porter in the employ of C. and Co., was accustomed to go on business for them to D., a tradesman with whom they dealt. After B. had left D.'s house, D. missed a box, and, suspecting B., he went to C. and Co., and in private said to one of them, "I have something particular to communicate; after B. left my house a mathematical box was missing; no one else could have taken it, because no one else was in the room, and he must have taken it." It was *held*, first, that the occasion repelled the inference of malice, and that D. had an interest in making such communication to C. and Co.; secondly, that the words were a privileged communication.—(*Aman v. Damm*, 2 L. T. Rep. N. S. 322.)

**INCOME TAX.—Foreign Residence.**—A firm carried on business by purchasing goods in England, taking them to America, and there selling them. They also bought goods in France and Germany, which they exported and sold in the same way. All the partners, except one, who resided in England, resided at New York. The firm had a warehouse and counting-house, and employed clerks and servants in England for the purchase of the goods. The goods were paid for by money sent from New York through the agency of a bank in England, with whom the firm kept an account. *Held* by the Ex. Ch., reversing the judgment of the Court of Exchequer, that the partners who resided in the United States were not liable to be assessed upon that portion of the profits of the business which was derived from the sale of the goods exported from England. Cockburn, C. J.: The question is narrowed to this. Does the firm, under the circumstances disclosed in this case, carry on trade in this country or not? and we think that it does not, and that the firm is not liable within the words of the Acts. It is true that whenever a merchant establishes himself in trade for the purpose of buying and selling, it may be that the details of his trade extend over various places; the place of sale or the place where goods are bought is not material, but we must look to the one place where he trades, and where the profits come home to him. Serious and unjust consequences would ensue from an opposite construction, which would render a firm liable to pay income tax in each of those countries in which there occur acts of buying, selling, or bartering. The argument for the Crown goes the length of saying that the employment of an agent in this country would render the firm liable if the agent buys goods for the merchant in this country, and we should thus be taxing a country which comes as a purchaser to this country. In case of a trade really exercised here it is only just, equitable, and proper, that a foreigner should be chargeable, and the profits of the trade are made amenable to this fiscal law by obliging the agent or person carrying on the business to make a return of such profits, but here there is no one who is in receipt of the profits in England.—(*Sulley v. The Attorney-General*, 8 W. R. 472.)

**APPEAL.—Authority of Decisions.**—The following observations of the Lord Chancellor in an English appeal case, relate to the *questio vexata* of the authority due to decisions of the supreme tribunal:—By the constitution of this United Kingdom, the House of Lords is the Court of Appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals. The observations made by members of the House, whether law members or lay members, beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities. But the doctrine on which the judgment of the House is founded must be universally taken for law, and can only be altered by Act of Parliament. So it is, even when the House gives judgment in conformity to the rule of procedure, that where there is an equality of votes, *semper presumitur pro negante*. In the case of *Regina v. Heelis*, 2 S. & S. 67, which was an appeal from a judgment holding that by the common law of England a valid marriage could not be contracted with-

out the presence of a priest canonically ordained, the question having been put that the judgment be reversed, there was an equality of the votes of the peers who were present and took part in the division. Thereupon the House affirmed the judgment, deciding that, by the common law of England, a valid marriage could not be contracted without the presence of a priest canonically ordained. I by no means concurred in that decision, thinking that the common law of England accorded with the Canon law upon this subject, which prevailed over the whole of the Western Church till the Council of Trent, and that a valid marriage might be contracted by the solemn assent of the contracting parties, as Lord Stowell had often laid down, and for fifty years had been considered clear law in Westminster Hall. But subsequently, when presiding as Chief Justice of the Court of Queen's Bench, I several times, with the approbation of my brother judges, ruled that the question as to the validity of such marriages was settled by the decision of the House of Lords in *Regina v. Heelis*. And if this question were again to be mooted in this House upon an appeal, I conceive that this House would be bound to decide that such a marriage was always null and void, although every peer present should be of opinion that *Regina v. Heelis* was improperly decided; and that in England, till Lord Hardwicke's Act, the presence of a priest was as little necessary for making a binding marriage contract as a binding contract of hiring and service. On this point, Lord Kingsdown stated that he desired to reserve his opinion—(*Attorney-General v. Dean and Canons of Windsor*, 8 W. R. 477.)

PRINCIPAL AND AGENT.—*Retention*.—A mercantile house in Hamburg instructed a firm in London, with whom they had dealings, to buy for them L.10,000 Three per Cent. Mexican Bonds at a certain price. The London firm bought the bonds, and drew bills on the Hamburg house for the amount of their account in respect of this transaction, which bills were duly honoured and paid at maturity. Before the bonds were handed over to the Hamburg house, the London firm stopped payment. *Held*, that the London firm were entitled to a lien on the bonds so remaining in their possession, for the general balance due to them in account with the Hamburg house. The M. R. : The plaintiffs do not dispute the general proposition of law, that a factor is entitled to a lien on the goods of his principal for the general balance due to him; but they contend that the defendants cannot be regarded in the light of factors to the Hamburg firm, and that the evidence shows that the Hamburg firm never consigned goods to the defendants to be sold, or, indeed, had any relations of that description with them. I am, however, of opinion, that the defendants are entitled to retain these bonds until the balance due to them on that general account is satisfied. The nature of the dealings between the Hamburg firm and the defendants appears from the evidence, especially from the correspondence, to have been of this character. The Hamburg firm was in the habit of employing the defendants to enter into speculations on their behalf, in securities and other matters in the London market; and when the Hamburg firm bought, from English manufacturers, goods to be consigned to them in Hamburg, they occasionally opened a credit with the defendants in favour of the shippers of the goods, and remitted money or goods, or honoured drafts, to meet the charges of the defendants. For all these purposes they were employed by the Hamburg firm, and acted as their agents. Upon a most careful consideration of the arguments of the defendants, I am unable to discover any principle which would entitle a factor to a lien for the general balance on the goods of his principal, which would not apply to an agency such as I have described, which existed in the present case, or which would not entitle the defendants to a lien for their general balance on any securities that come into their possession, as such agents of the Hamburg firm.—(*Bock v. Gorissen*, 8 W. R. 488.)

WILL.—*Survivorship*.—A testator by his will gave certain sums of stock to, and in trust for, and equally to be divided between, his three granddaughters and his grandson. By a codicil thereto, he revoked the bequests thereby made

to or in favour of his three granddaughters, and in lieu thereof he directed his trustees to pay the dividends of each of their shares to them for their separate use during their respective lives; and in case any of his said granddaughters should die without issue, he directed that the share of such of them so dying should accrue and survive to the survivors of all his said grandchildren, including the grandson, in equal shares, the shares of the daughters to be subject to the same terms and conditions as the original share thereof thereby given to or in trust for them. The grandson and two of the granddaughters died, leaving the third granddaughter their survivor. She afterwards died without issue. *Held*, that the word "survivor" referred to the period of each share falling in, and that on the death of the last grandchild without issue, there being no survivor at that period, her share was undisposed of, and fell into the residue.—(*Nevill v. Boddam*, 8 W. R. 490.)

**RATE.—Assessment.**—By a local Act it was provided that the gaol should be liable to "no rate, tax, or assessment whatsoever, parliamentary or parochial." *Held*, that within the term "parliamentary rate" was included a rate made by commissioners under a Local Improvement Act for the purposes of carrying the Act into execution. *Crompton, J.*: It is expressly recognised by the Court of Exchequer, in *Waller v. Andrews*, that "a parliamentary rate" may mean a rate imposed, not by Parliament, but by the authority of Parliament. We have also here the word "assessment," which, as far as I am aware, is never applied to a burden imposed directly by Parliament. I think the intention of the Legislature is clear, and has been sufficiently expressed.—(*Justices of Kent v. Maidstone Commissioners*.)

**RATE.—Literary Societies Act (6 and 7 Vict., cap. 36).**—The Liverpool Library was a society, the funds of which were derived from the purchase-money of the shares, from the subscriptions of members, from the fines of members, and sale of shares forfeited, and from the sale of earlier editions of books, the place of which in the library was supplied by later editions, and from the sale to subscribers at cost price of catalogues. In case of default in paying the periodical subscriptions, the shares of members might be declared forfeited. The shares were transferable, and might be sold. The rules contained a prohibition against any dividend, gift, division, or bonus, being made to or between the members. No newspapers were introduced, and the books were circulated solely among the members, and such strangers as were gratuitously introduced by them. *Held*, that the society was within the exemption of the 6 and 7 Vict., cap. 36, sec. 1, and that the exemption from rates of societies instituted for purposes of science, literature, or the fine arts exclusively, by virtue of the 6 and 7 Vict., cap. 36, sec. 1, applies to exempt such a society from rates imposed by Acts passed subsequently to that statute.—(*The Liverpool Library v. Mayor, etc., of Liverpool*.)

**LIBEL.—Inuendo.**—In an action for a libel saying among other things that the plaintiff was a "truckmaster," and was "cruel and heartless in his treatment of the men in his employ," no evidence of the meaning of the word truckmaster was given; and the judge told the jury that it was not an English word or in an English dictionary, and a verdict was returned for the plaintiff. *Held*, that the word being compounded of two English words, it was properly left to the jury to say what meaning the word, taken with the circumstances proved, was intended to convey. *Pollock, C.B.*: It may be observed that a word may possibly become a general word in the English language, though it may not be found in a dictionary; if I were asked what I thought was meant by "truckmaster." I own I should have no difficulty in saying, "I go along with the jury." I should say many words may come into use generally to be understood by the world at large, and to be explained by a judge, without being actually found in a dictionary. We must not take any particular book which professes to give all the words of the English language as absolutely and exclusively an authority for an English word. It is not necessary to give examples,

as every one must be aware that many words become of such frequent use in the English language, that everybody uses them, and a judge would be bound to expound them, though they have not existed so long as to be in the last edition of any English dictionary.—(*Homer v Taunton*, 8 W. R. 499.)

**LANDS CLAUSES CONSOLIDATION ACT, 1845.—Right to Support.**—A railway company, having taken land by compulsory conveyance in the form given by Lands Clauses Consolidation Act, 1845, schedule A (8 and 9 Vict., cap. 20),—*held* by the Ex. Ch., affirming judgment of the Court of Exchequer, that the company was not entitled to prevent the owners of the mines from working them without paying compensation, notwithstanding that, independently of the railway being made upon the lands, the mines could not be worked without letting down the surface.—(*Great Western Ry. Co. v. Fletcher*, 8 W. R. 501.)

**TRUSTEE.—Will.**—B. made C. his executor and trustee, with power to appoint co-trustees or succeeding trustees. B. died; C. did not take out probate, but by will, referring to B.'s will, appointed E. and F. to be succeeding trustees in respect of B.'s will after his death. F. proved C.'s will, and was called upon, as executor substituted according to the tenor, to take probate of B.'s will. It was held, that the distinction between the terms testator and executor in the two wills was so marked, that F. could not be called upon to do so.—(*Moss v. Bardswell*, 2 L. T. Rep. N. S. 300.)

**DIVORCE.—Condonation.**—Condonation is conditional on no offence, of which the Court takes notice judicially, being perpetrated in future; therefore that cruelty, once condoned, may be revived by subsequent adultery, and coupled with it, so as to form a ground for divorce. Sir C. Creswell: I cannot accede to this application. The cases cited establish that if a marital offence, which might have been the foundation of a sentence in a matrimonial court, has been condoned, it is revived by any subsequent offence which might itself have been the ground of a sentence of divorce *a mensâ et thoro*. With respect to the observations made on the supposed intention of the statute, I can see no reason why the husband should be placed in a better position by the lenity and forbearance of his wife, than he would have been in if she had not forgiven the first offence.—(*Palmer v. Palmer*, 2 L. T. Rep. 363.)

**TRUST.—Remuneration.**—Testatrix by her will appointed P. T. H., the plaintiff, who had for many years acted as her solicitor, one of her executors, and the will contained the following clause:—"I give and bequeath unto the said P. T. H., a legacy or sum of L.100 sterling. And I do hereby declare it to be my will and desire that, in the execution of this my will, the said P. T. H. shall be at liberty to charge for his professional services, as if he had not been appointed an executor of this my will." *Held*, that the trustee was only entitled to charge for what are strictly "professional" services, and not for work done and services rendered, which ought to be done or rendered by an executor in a lay capacity, and that, having undertaken the office of executor, he must perform its duties.—(*Harden v. Darby*, 8 W. R. 512.)

**MASTER AND SERVANT.—Culpa.**—To make the master liable for the death of his servant, it is necessary to prove not only that the work that caused the accident was insufficient, but that there was negligence on the part of the master in not employing a competent person to do the work. Therefore when, on a railway, there was a junction of two lines, at which point there was a turn-table which had been originally constructed for a single line, but when used for a double line it was braced for one line but not for the other, and it had been in use four or five years, when one of the company's servants employed on the line was killed by the falling of a carriage, caused by the breaking of the turn-table on the side where no additional bracing had been placed; it was held that there was no evidence of negligence on the part of the company, and no liability for the accident.—(*Potts v. The Port Carlisle, etc., Company*, 2 L. T. Rep. N. S. 283.)

THE

# JOURNAL OF JURISPRUDENCE.

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## PROSPECTS OF THE LEGAL PROFESSION.

THE profession has already heard enough of the complaint, that the business of the Court of Session is declining. We do not refer to that subject again for the purpose of inquiry as to its causes, or even with the more practical view of suggesting remedial measures. For the present, we accept the altered fortunes of the Supreme Court as an ascertained fact, and one which is likely to exert no inconsiderable influence on the fortunes and prospects of the legal profession for some time to come. It is true we cannot point, after the manner of the English journalists a few years ago, to deserted chambers, abbreviated cause lists, and returns of the number of barristers and solicitors who have emigrated to the diggings, in proof of the severity of the revolution which has overwhelmed the practitioners of our metropolitan courts. The rolls of the Court of Session still present those fair and ample proportions with which the profession is unhappily familiar, and which would not have done discredit to the English Court of Chancery in its palmy days of indolence and delay. The work accomplished by our Judges, if estimated by the bulk of the current reports, would appear to be on the increase; and a stranger, perhaps, would observe no falling off in the bustle and activity that pervade the Parliament House. But to the initiated, these appearances are too transparently deceptive. This increase in the number of cases annually decided, is in reality no measure of the amount of professional business done; it is the result simply of the attempt, which the Court has at length resolved on making, to clear off the arrears of business in its rolls. So favourable an opportunity could hardly have been anticipated by

their Lordships when they first applied themselves to this task ; but the truth is, as any one may ascertain by looking over the single bills of the last Summer Session, something nearly approaching to a total stagnation of new business. We are much afraid that, even without the extra pressure which has been brought to bear upon the despatch of business, the arrears of the Court of Session would, in a very short time, have disposed of themselves ; just as the largest reservoir will run dry when the means of escape are out of proportion to the supply. It is notorious also, that the character of the business depending before the Court of Session is undergoing a progressive deterioration. A large proportion of the cases presently depending, consists of appeals in bankruptcy, and advocations of trifling causes, brought either for the sake of delay, or to gratify the litigious propensities of the suitor, rather than to obtain justice. Actions of damages of all kinds abound, among which we may notice a new and obnoxious species, based upon allegations of fraud, in which the great object seems to be, not to ascertain whether a fraud has been committed, but to determine, by a most preposterous waste of judicial time and attention, and an unconscionable expenditure of the client's money, what precise amount of vagueness and *irrelevancy* may be infiltrated into a summons without proving fatal to its constitution. The old story of the man who would accustom his horse to live upon a straw a day, affords not an unfair parallel to the history of some of these unfortunate lawsuits. For, just when the success of the experiment is supposed to have been finally demonstrated, and the record has passed triumphantly through the ultimate stage of attenuation, it is found that the vitality of the action has been undermined ; and ten to one it dies of inanition, without even getting the length of a jury ! We are glad to own that there are signs of some improvement in this as in other branches of practice ; but it is impossible to deny that the quantity of chaff in the rolls of Court bears a somewhat unreasonable proportion to the good grain, and that the large admixture of trashy cases destroys altogether the value of these documents as a criterion of the amount of *bona fide* business depending before the courts in Parliament Square.

It happens somewhat singularly, notwithstanding the state of stagnation to which the market of litigation has been reduced, that the number of aspirants to forensic eminence is constantly and steadily increasing. This singular exception to the natural law of

supply and demand must be susceptible of explanation. Some disturbing element is obviously at work; and that element we conceive to be neither more nor less than *ignorance*,—ignorance general and wide-spread, regarding the conditions and prospects of professional success.

That we are not mistaken regarding the matter of fact, the professional reader will readily grant; but for the benefit of the uninitiated, a word of explanation may be necessary. It is in the profession of the Bar that the excessive supply of raw material is most painfully manifest. We believe our remarks might be applied in strictest justice to the walk of the barrister throughout the United Kingdom; it is with Edinburgh, however, that we are more immediately concerned. Within the last ten years (including a portion of 1860) there have been very nearly a hundred admissions to the Faculty of Advocates. In the two decades commencing with 1830 and 1840, the number of admissions is somewhat less: that, however, is the least important point in the contrast to which we invite attention. In looking over the list of the Faculty, it is impossible not to be struck with the disparity between the numbers of practising men of the rising generation and those of the previous twenty years. Among the last hundred names in the list, it is just possible to select about fifteen, representing men who have either retired from practice, or have merely been called to the Bar as an honorary profession. Certainly five-sixths of the entire number may be described as *bona fide* practising barristers; and practising; be it observed, in a Court which decides about 250 cases in the year. Look, now, at the reverse of the picture. In neither of the periods of 1830–40 and 1840–50 is it possible to name fifteen men who have any practice worth naming; indeed, if we said *ten*, we would be nearer the mark. Prior to 1830 there is scarcely one; and we may therefore safely assume that the five and twenty or thirty men whom we have in our mind's eye, and whom the reader can pick out for himself from the list in *Oliver and Boyd's Almanac*, represent the full complement of senior counsel for whom employment can be provided in the Superior Courts in Edinburgh. Indeed, we are greatly overstating the number; because, in reality, several of the leading practitioners of from ten to thirty years' standing are in *junior* practice; and of the remainder there are several who might retire from practice altogether without leaving very much to divide amongst their more fortunate brethren.



From this explanation it will be apparent that the number of practising junior counsel in Edinburgh is out of all proportion to that of the senior Bar ; and we may add, equally out of proportion to the requirements of the profession. Yet let not the young aspirant imagine that many of these are idle men, men who need not be taken into account in estimating the number of competitors with whom he must strive for distinction. It is well known that the bulk of professional men throughout this country are more or less dependent on their profession for support ; and we are not aware that the Bar of Scotland forms any exception to the general rule in this respect. Nor can we flatter those who are looking forward to admission to the Faculty, with the hope that many of those who are *in*, will retire from practice, and give place to more enthusiastic competitors. Every day the avenues of business are becoming more strictly fenced ; and experience demonstrates the fact, that it is extremely difficult, if not impossible, for men who have failed in one walk of life to succeed in a new career. In short, we may take for granted, that all who have succeeded in securing for themselves a share in the substantial advantages of the profession, will hold fast by their position, in the hope of ultimately improving it.

In this state of matters, we would venture, if we had the opportunity, to offer a word of sincere advice and remonstrance to the friends of those young gentlemen who are pressing forward into the ranks of the legal profession, believing they are on the road to wealth and fame, and little dreaming of unavailing regrets and disappointment which too surely await them. Assume, sir, we would say—assume if you please that your son, who has eclipsed all his school companions as a linguist, who has gained the prize poem at his college, and is even possibly a favoured contributor to the local newspaper, is as qualified to conduct a case as the prosaic individual whom you now see laboriously hammering at the construction of a deed of settlement at Lord Drumthwacket's bar. We agree with you. The question is not, Can he argue as well ; but, Can he do better—*so much better* as to deprive this prosaic personage of the practice he enjoys through the favour of three or four of his friends ; one, perhaps, an old college acquaintance ; another a near relative ; a third the correspondent of an old friend of the family, and the rest all more or less connected by the ties of personal or political interest and good fellowship ? The physician, the clergyman, and the merchant, may all succeed without displacing their

contemporaries. Vacancies will occur ; new branches of business may open up ; new men enter the field, who naturally seek for business relations amongst friends of their own standing. But the path to success at the Bar lies over the bodies of those who have been struck down in the race ; because the field is limited, and practice is only to be obtained at the expense of others whose established connection will always constitute heavy odds in their favour against the untried aspirant.

" Well," says our friend Jones, as he runs over these pages some dull morning in the Parliament House, " what he says is all very true ; practice all depends on the favour of those stupid fellows the agents ; a set of precious humbugs, who have no discernment for real merit !" Don't misunderstand us, brother Jones ; we have our doubts on this point also ; and you, who are still in your noviciate (though you did happen to be " Dean" at the last Inverary Circuit), are not presumably a very competent judge of the merits of your seniors. We will not deny, since denial would be unavailing, that you carry the cocked hat of a future Lord President in your pocket ; nor that that yonder learned society, which last night cheered your panegyric on the " educated" electors of Great Britain, will one day place your name in the front rank of its roll of honorary members. This, however, we will guarantee : you will have your opportunities—your chances of success. Everybody has ; some are less successful than others ; a circumstance which is, of course, entirely attributable to accident ; demerit or inability having, as every one is aware, no hand in the failure of any professional aspirant, under any circumstances whatever. To be serious, we believe that, on the whole, practice is very fairly distributed in our Courts, according to the qualifications of the various members of the profession, although accident or interest may now and then give a man the advantage of an early start. Our remark is certainly less applicable to the walk of the solicitor, whose business is to a great extent dependent upon interest and established connection. It is otherwise at the Bar ; and the number of candidates amongst whom the practice is at present divided, whilst it says something for the impartiality of the other branch of the profession, is a pretty clear indication, we are afraid, of something like general mediocrity amongst our learned brethren. " Wanted a genius," ought to be inscribed on the door of a certain building, to which one sees affixed three or four times a year certain proclamations in mysterious hiero-

glyphics, and headed "Disputatio Juridica." If you, O ingenuous reader, feel quite sure that you would be entitled to respond to the imaginary advertisement, pray enter the portals consecrated to learning, eloquence, and so much of contemporary applause as may pass for fame. If you are not, it may be well to consider whether some humbler but more lucrative occupation be not preferable to a profession which, like the army and the church, offers you the position and the expensive habits of a man of leisure, with the income of a junior clerk in a mercantile establishment.

### THE PHILOSOPHY OF LAW MAXIMS.

#### III. CULPA—MORA—IMPERITIA.

HAVING explained, in our last number, the general principles of *Culpa*, *Imperitia*, and *Mora*, we come now to consider a few of the legal maxims in which they, popularly, find expression. *Culpa* has already been defined both by its generic and by its special attributes; we are introduced to one of its most familiar dogmas in the rule,—

"*Culpa est immiscere se rei ad se non pertinenti.*"

A person does wrong who interferes in things with which he has no concern.

The remark has previously been made, and it is again suggested by the rule before us, that these maxims have both an obvious or *prima facie* meaning, which is, for the most part, the enunciation of a moral truism, and a secondary or legal one. In the rule which we are now considering, there is this additional peculiarity, that the one sense is in some danger of being held, and, in point of fact, has, by some commentators, actually been held as precisely synonymous with the other. The question, then, is here important, and meets us at the very threshold—What is the legal meaning of the rule? Does it imply merely that a person who interferes with the business of another, with which he has no concern, commits an act which is legally wrong? We think not; and we repudiate this interpretation as a mere repetition of the moral platitude, on the ground that, in point of fact, this is not the view which the law adopts. For it is notorious that the law does not always hold interference with another man's affairs to amount to *Culpa*. It certainly always gives the action *negotiorum gestio*. But the action *negotiorum gestio* does not necessarily involve the presence of *Culpa*, and its practical result is often a mere accounting between the parties, in which every-

thing turns out to their mutual satisfaction. It is only when *Culpa* is actually present, that the law can be said to hold interference with another man's affairs to be culpable ; and a law which carries with it so much of an *ex post facto* character, can scarcely be regarded as a general maxim.

What we apprehend as the true meaning of the rule, depends upon a more technical construction both of the term *rei* and the qualifying word *pertinenti* than is embodied in the ordinary sense. According to this view, we accept it as implying, not so much a prohibition against interference with the private property of another, as a caution, directed from a social point of view, against all such transactions as are inconsistent with the profession which one publicly assumes. And it does not militate against this interpretation, that the principle which forms the substance of it wields a powerful influence in the sphere of modern law. It was not less familiar to the Romans, and it may be said, indeed, to have been carried out in the practice of their law with a rigour and severity which are altogether alien to our own. It was, for example, one of the special objects for which the provisions of the *Lex Aquilia* were enacted, to give reparation for the damage caused through the ignorance of those who made unauthorized pretension to a knowledge of the sciences and arts (*D. Lib. ix., Tit. 2*). And the liability, in such circumstances, being specifically put on the ground of *Culpa*, we are led to advert to a distinction which is indicated by the rule, and is not unworthy of attention. A person who, being invested with the requisite authority, undertakes a duty of a technical description, and causes damage to another through his unskilfulness in the performance of it, is held bound to repair the injury sustained, according to the principle, "*imperitia culpæ adnumeratur*." But he is judged by the standard of *Imperitia* ; and *Imperitia*, though it is said to be allied, is by no means equivalent to *Culpa*. A person, on the other hand, who causes damage of a similar kind, but under the aggravation of wanting the public authority, which is the usual warrant of a profession of skill, is amenable to the standard of *Culpa* itself. And the two methods of calculation are far from leading to identical results. There is a difference incidental to the very nature of the transactions from which the *Culpa* springs, and that will naturally induce, in the first place, disparity in point of degree. There is, in addition, the broad distinction which the law may be expected to establish between an act which, though unskilfully per-

formed, is in itself lawful, and an act which is both unlawful and unskilfully performed at the same time.

The principle of the rule enters largely into the law of Scotland, both criminal and civil. It always aggravates an offence, if, in addition to its violating prescribed statutory limits, it is committed by one who is not entitled to engage in transactions of the kind in question to any extent whatever. Upon a recognition of the same doctrine, depended the former practice of our law in the matter of exclusive privileges. The monopolies conferred on Trades' Corporations, King's freemen, and other public bodies, though seldom dictated by sound considerations of public policy, gave practical expression, notwithstanding, to the idea of providing for the public interest, by the protection of a certain measure of authenticated skill. Since the passing of the Act 9 Vict., c. 17, however, the subject has gradually been divested of all except its historical importance. So far, at least, as the branch of law with which it is connected is still operative among us, the principle of the rule is not likely to receive effect in the spirit of the decision pronounced in the case, *Tailors of Aberdeen v. Munro*, Jan. 19, 1831, 9 S. 291, where it was ruled that a discharged soldier, being ignorant of the business of a tailor, was not entitled to commence business within the burgh, by entering into partnership with an unfreeman, and taking unfreemen into his employment. The doctrine, also, now sufficiently familiar to the practice of our law, that a servant must be able to do the work for which he hires himself, or make good the damage which is occasioned by his ignorance, may be adduced as another assertion of the principle of the rule.<sup>1</sup>—1771, *Burnet*, M. 8491 ; 1801, *Gunn*, Hume, 384.

“ *Culpa caret, qui scit sed prohibere non potest.* ”

He is free of blame, who knows but cannot prevent.

This rule has its *primâ facie* application rather in the sphere of public than of private law, and expresses, in a negative form, the

<sup>1</sup> This illustration recalls our attention to the important distinction which we previously expounded, between a lawful act unskilfully performed, and an act which is both unlawful and unskilful at the same time. The liability of the servant, it will be observed, does not proceed on the ground of the principle. “ *Spondet peritiam artis, et imperitia culpæ adnumeratur.* ” His *culpa* is something more than *imperitia*. It is the positive avowal of a *peritia* to which he has no title. The distinction, though somewhat subtle, is practically important and worthy of attention.

obligation incumbent upon every individual, of disclosing any intended plot against the State of which he may have cognizance, under penalty of being punished as an accomplice in it. It was expressly imposed by Justinian, in his 117th Novel, and in the earlier *lex Julia Majestatis* it is laid down that "*Subditus qui consilia adversus principem habita non detegit puniendus est.*" Apart, however, from all special enactment, it is an implied duty as between prince and subject, and the simple constitution of such a relation is, of itself, sufficient to induce its natural responsibilities. It was in keeping with the general character of the feudal system, in its earlier manifestations, and descriptive not less of its indifference to the conditions of public policy than to the rules of private justice, that it lent its sanction to the principle, "*Vasallus secreta domini detegere non tenetur; imo nec debet.*" In our modern law, misprision of treason, or concealment of offences against the State, involves the guilty party in statutory penalties of a very serious kind.

But the rule implies something more than this negative meaning, since it holds good in circumstances where individuals are concerned, as well as in cases where the State intervenes as a party. In this view, our attention is directed to its positive or literal construction—to the proposition which it directly affirms; and, thus interpreted, it has a wider operation in private than in public law. For, where offences against the State come to be considered, it can never be a question, whether or not the party charged with a guilty knowledge of the criminal design could have staid its execution. Of this contingency he is no judge,—his duty being absolute, to disclose his information. There is a distinction, however, in the case of individuals; and the Roman law, in particular, furnishes some striking illustrations of the difference. It was a principle of the earlier law—dictated by a high sense of public morals—that an individual who was witness of an attack against an unarmed person, and, having the power and opportunity of repelling the aggressor, failed to exercise them, was treated as an accomplice in the murder which might ensue from the assault. But this was rather an extreme application of the ethical doctrine laid down by Papinian, "*hominis interesse hominem quemcunque beneficio affici,*"—that, in the interest of humanity, it is well that people should be disposed towards general benevolence. The law could not be permanently established upon a basis extending so widely into the sphere of morals; and while

jurists continued to debate the question, whether the protection of alien interests is a matter of inclination or of duty, it gradually became the rule that, as between man and man in their private capacity, such a full measure of obligation was not imperative as between individuals and the State. Private knowledge, of itself, was not deemed sufficient, in the former case, to justify an inference of complicity. The general principle was not, indeed, abrogated, that it was the duty of every one to do what lay in his power to prevent an injury falling upon his neighbour. But it was not deemed unreasonable, in view at once of the inferior interests involved, and of the fact that the same legal relation is not constituted between individuals as subsists between individuals and the State, that the party charged with a mere negative wrong should, at least, be exempted from the burden of proof. If he knew and could prevent, that was a position to be verified by the party who impeached him. If, admitting knowledge, he should plead his inability to act, he was not, on slight grounds, to be involved in penal liabilities for the suffering of another in which he had no concern.

Beyond the general reference we have made to the law of treason, the law of Scotland does not admit of much direct illustration of this rule. It operates most widely among those questions which lie in the intervening ground which separates the public from the private law; and, while these were familiar to the practice of the Romans, they are altogether unknown to our own. With us, the two departments are marked off from each other by clear, broad lines of difference; and though the spirit of the rule is reflected largely from the principles of both, its presence does not always meet us in a palpable and concrete form.

*"Quod quis ex culpa sua damnum sentit non intelligitur damnum sentire."*

A person suffering loss through his own fault is not held to suffer loss.

We have already called attention to a frequent characteristic of these maxims, that they affirm at one and the same time a moral truism and a legal proposition. It is almost superfluous to advert to another circumstance by which they are distinguished, which forms, indeed, a feature of all truths expressed in the concentrated form of aphorisms, and is generally regarded as one of their inherent disadvantages. We allude to the fact, that while, in their scientific sense, they bear a deep significance, there is a popular view according to which they seem to aver, not merely a common platitude, but

sometimes to state a proposition which either contradicts its own terms, or is manifestly false. The rule now before us illustrates this peculiarity in a very striking manner. To say that one who suffers loss through his own fault cannot be held as suffering loss, is to use language which, to the apprehension of ordinary men, carries with it a palpable contradiction. It is only when the terms of the assertion are examined by the light of legal science, that they are invested with an intelligible meaning.

In the Roman law, when a person sustained any loss through the fault, negligence, or malicious wickedness of another, he was said to suffer *damnum*; and this expression, which, in its strict philological sense, applied to the condition of the suffering party, was ultimately used, in the language of law, to denote the measure of damages or relief in which the doer of the wrong was held liable by the sentence of the Judge. It is in the sense that no third party is condemned to make good the loss, when a person suffers through his own fault, that we are to accept the assertion of the rule. And this interpretation leads us to advert to its great practical result, that, where loss is directly referable to one's own fault, no damages can be claimed from a third party, whatever other reciprocal obligations may arise out of the transaction to which the loss attaches. This is a principle of universal application in the law of Scotland. Thus, for example, the general doctrine of eviction, whereby a seller is bound to make good the loss of the purchaser, is qualified by the rule, that where the loss arises from the purchaser's own fault, as by his undertaking to resist the claim, and failing to state the true defence, he is excluded from the action of relief (Bell's Pr., sec. 125). So in actions of warrandice generally, while an exact interpretation will be put on express terms, and warranties clearly assumed, the law is strict to mark that no one shall impose upon another the burden of his own fault. See the case of *Russell v. Ferrier* (June 12, 1792; Hume, 675), where, in an action on the sale of a horse, which was warranted by the seller as "sound, free of all disease and blindness," notwithstanding that it had been suspected of blindness, and had blemishes about the eyes which were known to both parties, it was held that blindness subsequently supervening did not render the seller liable in repetition of the price, on the ground that it was directly referable to unskilful treatment on the part of the purchaser. The same doctrine was even more strongly affirmed in the later case of *Geddes v. Pennington* (May 19, 1814; House of Lords,



June 16, 1817), under circumstances which very clearly indicate the disposition of the law towards the principle embodied in the rule.

We pass over the well-known maxim, "*Unicuique mora sua nocet*," as affirming nothing more specific than the general principle which we have already considered. The next two rules, as referring to the same branch of the doctrine of *mora*, will be best considered together.

"*Nulla intelligitur ibi mora fieri ubi nulla petitio est.*"

Where there is no right of action, delay is not held to be incurred.

"*Qui sine dolo malo ad iudicium provocat non videtur moram facere.*"

He who appeals to law without any fraudulent object, is not held guilty of delay.

Of these, the first does not admit of much direct illustration. It is one of those legal maxims which are felt to be indispensable to every well-ordered system of law, but which, from its very abstract terms, it is not easy to detect in any concrete form. We notice it here principally as requiring great exactness in the method of construction, and as raising a distinction not altogether of an obvious nature. At first sight, it might be held to assert, that where there is no petition, there can be no delay. But such a proposition would bear no legal force; for there are circumstances in which, without any antecedent demand, the law holds delay to have taken place. A case of that kind arises when, in money obligations, *dies interpellat pro homine*, and the term of payment is past. What really is affirmed by the rule, is a principle of law, not a mere declaration of fact. It is the doctrine, that where there is no right of action, there can be no *mora* on the part of him against whom the action is addressed; in other words, that the penalties of delay are not incurred by refusing effect to an obligation which is *ipso jure* null. It is thus clearly and concisely stated by the author of the rule—"*Ex obligatione petitio, ex petitione mora nascitur, ideoque ubi nulla obligatio est, ibi nulla petitio, et ubi nulla petitio, ibi nulla mora.*"

The principle of the second rule is more frequently encountered in practical operation. Its meaning is, that a person who resorts to law on just and reasonable grounds, is not to be involved in the consequences of *mora* as a penalty for doing so. What are just and reasonable grounds, will, of course, be variously interpreted. Gothofred, in his commentary on the rule, says it consists in following the usual practice. The Romans, with the view of preventing vexatious litigation, imposed upon suitors the *iuramentum de calumnia*,—an oath

which, on similar grounds, was imported into our law by Act 1429, c. 125, and entered largely into our former practice. In the present day its use is almost entirely limited to actions of divorce; and this fact suggests the consideration, that the rule has a wider practical significance in a system such as ours, where a large discretion is allowed to the will of individuals, than in circumstances where, as in the Roman, it can only operate under the conditions of a narrow and somewhat arbitrary test.

The author of the rule adduces as an illustration the case of a depositary refusing to give up to a third party the goods of which he has the custody, on the ground that the claimant either cannot produce authority from the depositor, or instruct a title as his heir. The same example might be stated from the law of Scotland, and others, equally pertinent, could be multiplied indefinitely. There are few principles, indeed, the presence of which will be more largely detected among different branches of law, which have little or no special connection with one another. It underlies the whole doctrine of Diligence, indicating, in a general way, the limits within which legal remedies may be resorted to, without incurring the penalties of irrelevant pleading. It enters into the principle of Retention, pointing to a boundary, beyond which it is not safe to turn to one's own advantage the accident of possession. Its influence is felt in Assignations, in circumstances, generally, in which the relation between the original contracting parties may give place to another; while, in questions between debtor and creditor, which are likely to lead to the judicial consignation of money, it operates with unusual frequency, and with a striking practical effect. Perhaps, however, its full significance is nowhere better realized than in the important department of Process included under Arrestments and Multiplepoinding. The theory of the latter diligence, indeed, is the principle of the rule itself—Multiplepoinding being nothing else than a *provocatio ad judicium*, established by the law,—a remedy which, in the event of double distress, the holder of the common fund, as a general rule, may lawfully employ. To verify these general statements by a reference to individual cases, would be quite an endless task; we shall content ourselves with a single illustration. In the case of *Craig*, 13 Jan. 1847, it was held in strict conformity with the principle of the rule, that goods, being deposited by one party, and arrested as the property of another, the arrestee was entitled to hold possession till judicial authority to de-

liver was obtained. On the one hand, it is a general principle of law, that an arrestee must give effect to an arrestment, and its attendant forthcoming; on the other, it is a rule of not less authority, that a depositary, while suffering arrestment in his hands, must retain his charge, *qua* property, as against every one but the original depositor. In circumstances, therefore, which combine these two conflicting elements, a person being both depositary and arrestee at the same time, is well entitled *provocare ad iudicium*. In the present case, that appeal consisted in the retention of possession, with the view of inducing a judicial settlement between the parties; and the law, considering that this was done on just and reasonable grounds, held the arrestee justified in refusing satisfaction to the claims of both.

We conclude this branch of our subject with the rule—

“*Imperitia culpæ adnumeratur.*”

Want of skill is accounted culpable.

In our institutional text-books this rule is generally introduced by the words, “*Spondet peritiam artis*,” and they are worthy of attention, as containing an expression of the grounds on which the doctrine of the rule proceeds. For *imperitia*, as a mere abstract consideration, is not the circumstance which, of itself, induces liability. There are many relations in life in which a want of skill may be exhibited to the injury of others, without involving the guilty party in the consequences of a penal action. It is only accompanied by this result when, in the eye of the law, it is accounted culpable; and it is only accounted culpable when the possession of it has been antecedently avowed. And this does not, necessarily, require a positive declaration. It is always held by law to be made where the performance of an act requiring skill is undertaken by one with the view of hire, or with some other object tending to his own advantage. A case, therefore, of necessity, or interference by one party at the request and for the benefit of another, are not circumstances falling within this apprehension of the law.

The rule was a favourite maxim with the Romans, and the illustrations of it in the *Pandects* are very numerous. A large collection of these will be found in the 2d title of the 9th Book, under the commentary on the *Lex Aquilia*. Among other instances, are mentioned those of a physician improperly castrating a slave (l. 7,

sec. 8) ; of an artisan undertaking to polish a cup, and breaking it (l. 27, sec. 29) ; of a muleteer unable to restrain his team, and running down a passenger (l. 8, sec. 1). In all these cases, the parties were liable for the damage caused through their unskilfulness, and reparation might be enforced either *ex locato* or *ex lege Aquilia*,—the terms in the Roman law corresponding to our actions under the contract, or at common law, and under statute. An exception, however, to the rule is noticed in D. xi., T. 6, l. 1, sec. 1 : “ *Si mensor falsum modum dixerit*,” etc. This was the case of a land-surveyor, who was not accounted liable, either to the purchaser or seller of an estate, for any mistake in marking off its boundaries. The grounds of his exemption were, that there existed no contract of location between the parties—that while, on the one hand, his services had all the character of a *beneficium*, his recompense, on the other, was strictly to be regarded as a *honorarium*. There being, according to this view, no civil obligation, he was only held bound to make good the consequences of *dolus*.

The rule has been imported into our law in very much the same form which it assumed in the Roman. It is well known in practice, and our institutional writers have attempted to fix down its application to the standard of certain definite principles. But we cannot see that any clear and satisfactory conclusion has been arrived at in this way. Abstractly considered, there are few doctrines in our law which more skilfully evade the restrictions of positive rules ; and the train of our decisions does not suggest that it has, practically, enjoyed a very uniform operation. It seems, therefore, more consistent both with theory and practice to state the points which have been settled, less as collateral dogmas, than as additions and limitations to the general principle of the rule. This we shall now endeavour to do shortly, in bringing the present branch of our discussions to a close.

That when, in the ordinary intercourse of life, a person undertakes an act requiring skill, and fails in the due performance of it, he must repair the incidental damage, is about the most general statement that can be made of the doctrine we are now considering. In this broad sense it has obtained a very frequent recognition (*Peddie v. Scott*, Feb. 1798, Hume, 304 ; *Sim v. Clark*, Dec. 2, 1831, 10 S. 85 ; *Aff. July 1, 1833*, 6 W. S. 452 ; *Clason v. Black*, Feb. 15, 1842, 4 D. 743). These are the cases of a farrier, of a lawyer, and a messenger, held liable for unskilfulness in their several occupa-

tions. But whenever this proposition has been made, we are met by qualifications and exceptions. Of these we note the following:—

(1.) It is not every degree of *imperitia* that induces liability. In the absence of express agreement,—and express agreement in such circumstances is practically impossible,—it is not the highest skill that is required, but only such an amount as is fair and reasonable (Bell's Pr., p. 61, sec. 153). What that amount is, must, in all cases, be a matter of evidence; failure and success being alike rejected by the law as exclusive tests. A surgeon is not bound to cure his patient. A law-agent does not undertake, at all hazards, to win his cause.

(2.) The principle of the rule is further modified in the proposition, which at the same time repeats the substance of the last, that a man of skill who follows the usual practice of his profession, is not liable for *imperitia*.<sup>1</sup> *Grahame v. Alison*, Dec. 3, 1830, 9 S. 130; Aff. July 19, 1833, 6 W. S. 518.

(3.) In point of fact, *imperitia* can never change its character. But even when established, a party guilty of it may incur no liability in point of law. This is the case when the discretion of a professional man yields to the injunctions of the person to whom he hires his skill. Mandate is substituted for location, and the reciprocal obligations are ruled accordingly. But this relation is one which seldom occurs in practice. Complete freedom of judgment is a principle almost necessarily involved in the operation of skilled labour. The point decided in the case of *Megget v. Thomson*, Feb. 2, 1827, 5 S. 275—that an agent who received instructions from his client as to the preparation of a summons, and on the advice of counsel followed another course, which proved to be erroneous, was entitled, notwithstanding, to the payment of his account—may be stated as an exception to the general rule.

(4.) But while special injunctions, as raising the contract of mandate, must be strictly obeyed, mere general instructions, addressed to a man of skill, admit of deviation within the limits of known professional practice. *Burnet v. Clarke*, 10 Dec. 1771 (8491). Here

<sup>1</sup> In stating this rule as a branch of the general doctrine, we are also following the usual practice. But its terms are, clearly, philosophically inaccurate. *Imperitia*, indeed, has so much of a relative character, that what is want of skill in some circumstances, may not be accounted so in others. This circumstance, however, is more than expressed by the imposition of an *ex post facto* test. If following the usual practice constitutes *peritia*,—and this is a position which, speaking generally, we are entitled to assume,—the mere failure of the event to which it is applied, does not certainly convert it into the very opposite.

another exception falls to be stated ; a messenger having been held not to be a man of skill in this sense of the rule, or rather this particular application of it, and therefore bound to adhere to the letter of his instructions. *Miller*, July 10, 1810, 15 F. C. 750.

(5.) *The imperitia* which, on the general principle of the rule, is held actionable, is that of a professional man who hires out his skill. The conduct of others, rendering free services, is judged by the standard of *negotiorum gestio* ; and the consideration that no reward is taken may have the effect, as we have seen, of diminishing the liability for *culpa*. It is a peculiarity of the relation subsisting between a professional man and his client, that this circumstance will not exempt from the responsibility which attaches to him as a man of skill. *Currie v. Colquhoun*, June 17, 1823, 2 S. 407.

We now take leave of this branch of our discussions, having illustrated the general principle of the rule, and shown its extensive application both in the civil law and in our own. It does not fall within our province to deal with matters of detail. The question of what, in different circumstances, is to be accounted *imperitia*, and the measure of compensation to be exacted for it, are strictly of this character ; and, on these points, we must refer the reader to the works of our institutional writers.

W. A. B.

#### OUGHT THE OUTER HOUSE TO BE CONTINUED AS A SEPARATE COURT?

WE have been favoured with a perusal of a valuable paper by a late much esteemed member of the legal profession, being notes on the Report of the Select Committee of 1840 on the Supreme Court of Judicature in Scotland, with the Minutes of Evidence. The writer (Mr David Cleghorn, W.S.) was at the time Crown Agent, and the notes were made with a view to be submitted to the late Lord Rutherford, who was then Lord Advocate. The views expressed in regard to the institution of permanent Lords Ordinary, and judgments by them, are well worthy of consideration, and so forcibly expressed, that we extract with permission that portion of the notes which deals with this subject :—

I think there should be no decision by a Lord Ordinary, and that the great evil is that it is made necessary to obtain such a decision.

I do not expect to see any great improvement until such an alteration is made in the system as shall entitle a litigant to obtain one decision only, and that pronounced by a Division of the Court consisting of four Judges. I think the institution, in 1808, of permanent Lords Ordinary, was a great error, and I shall now state some of my reasons for thinking so.

When the Court consisted of fifteen Judges, cases were brought before all of them by weekly rotation, with the exception of the Lord President. In this way the cases were prepared and decided in the first instance by a Lord Ordinary; but that Lord Ordinary, except during the week in which by rotation he was in the Outer House, sat on the bench and judged in all cases which came before the Court, including those which he had himself decided. In 1808 the Court of Session was formed into two Divisions, and the Lords Ordinary were made what has since been called permanent. By the Act then passed, there was a complete distinction made between the Judges, who had formerly been equal. Five of them were appointed Lords Ordinary, and the remaining ten formed two Courts of Review, consisting of five each. The duty of the Lords Ordinary was to prepare and decide causes in the first instance; their decisions being in all cases subject to the review of one of the Divisions. From that time, although a lawyer was appointed a Judge of the Supreme Court, he was not admitted to sit in the Inner House in conducting the ordinary business of the Court, but was placed in the Outer House in the rather humiliating situation of having all his decisions reviewed by Judges who, according to the constitution of the Court, were not his superiors in any respect, and had only become entitled so to review them from the circumstance of seniority. On the other hand, the duty of the ten Judges of the Inner House was limited nearly to the power of reviewing the decisions of the Lords Ordinary. This distribution of the business appears to me to be injurious to the Bench, the Bar, and the litigants.

1. *As regards the Bench*, the five Lords Ordinary are placed in very unfavourable circumstances. Where a power of reviewing judgments is given, the Court of Review or Court of Appeal is presumed to be better fitted for giving a proper judgment than the Judge appealed from: thus the decisions of the Sheriff-substitute are subject to be reviewed by the Sheriff-depute, and afterwards by the Court of Session, and the decisions of the Court of Session are

subject to appeal to the House of Lords. The decisions of the Lords Ordinary are thus held to be of less value than the judgments of the Inner House, thereby holding them as inferior Judges. From the questions put by the English and Irish lawyers, it is evident they consider the Lords Ordinary as holding separate Courts.

In preparing and deciding cases, the Lord Ordinary has not the means of making known to the public and the Bar the views under which he decides them. From the size of the rooms in which the debates take place, the Bar are excluded from hearing the discussion ; everything is carried on in private, and the Lord Ordinary's interlocutor and note are prepared by him at home. One natural effect of this is the desire of the Lords Ordinary to make known the grounds on which they decide, so that the parties, the Court of Review and the Court of Appeal, may know the grounds of their decisions ; and as every case may be carried to appeal, the notes are necessarily so full as to meet that possible contingency.

When the Lord Ordinary has, after great labour, pronounced a judgment, if it is acquiesced in the case is lost to the profession and the public, as such cases are not reported. Holding, therefore, that these cases are well disposed of, the Judge does not get any credit with the public for the disposal of them. If, however, the decision of the Lord Ordinary is submitted to review, it is then reported, and appears as a case in which one of the parties was dissatisfied with the judgment. The decisions of the Lord Ordinary thus only become known to the Judges of the Inner House, and to the Bar, when they have given dissatisfaction to one of the parties, and therefore may be considered doubtful ; and if altered by the Court, then, unless the decision of the Court shall be altered upon appeal, the Lord Ordinary must be held to have pronounced a bad decision. The duties thus imposed upon the Lords Ordinary appear to expose them too much to criticism ; and to this exposure they remain for a period of ten or twelve years, until by seniority they are admitted to become members of the Inner House.

As to the eight Judges forming the two Divisions of the Inner House, the separation of the Lords Ordinary from them does not appear to be attended with any good effect. They are the eight oldest Judges of the Court ; and when a vacancy occurs, it is supplied by the eldest Lord Ordinary, who may have been ten or twelve years acting in that subordinate capacity. If he has given satisfaction as a Lord Ordinary, and has thus been overloaded with busi-



ness, he may be supposed to look to the Inner House as a place of repose. If, on the other hand, during the probation he has not given satisfaction, he is not likely to add much to the confidence of the public in the Court of Review of which he becomes a member.

If, when a vacancy occurs in the Inner House, in place of getting the oldest Lord Ordinary, the vacancy were supplied by the most eminent lawyer at the Bar, he would carry with him the confidence of the public, and would thus be a certain and valuable acquisition to the Inner House. I conceive that the Inner House ought periodically to receive such additions, and that the want of them cannot be supplied by any other means.

The duty of the Judges in the Inner House being, in a measure, limited to that of reviewing the decisions pronounced by the Lords Ordinary, their equals in all other respects, great allowance should be made for their not feeling the full weight of responsibility, which would attach to them if they were judging of the whole case originally, and at the same time finally. Where Judges of Review have the record before them, and the interlocutor and notes of a Lord Ordinary in whom they repose confidence, any rule of Court which may require that they should hear long speeches from counsel is not likely to produce any beneficial result. It is different where cases are carried by appeal to the House of Lords, where there is implied a greater want of knowledge, on the part of the Judges, of the law by which the decision should be given : the presiding Judge there may be supposed really to hear counsel patiently, when he is supposed to be getting information. It is different with the Judges of the Court of Session, who are supposed to be familiar with the law of Scotland, and who, in reviewing the decisions of a Judge in all respects their equal, may be supposed to regard his opinion with partiality.

What has now been said as to the Bench applies universally ; but what has taken place since the Judicature Act passed, appears to me strongly to confirm the views I have stated. Since then, three of the most eminent lawyers of their time (Lords Cranston, Moncreiff, and Jeffrey), and each of them having been Dean of Faculty, have been appointed Judges ; but in place of going at once to the Bench, two of them remained Lords Ordinary for nearly twelve years, and the third is still undergoing his probation in that capacity. It has recently been stated in the House of Lords, that from the eminent qualifications of one of those three, it was con-

templated that he should have been taken to the House of Peers to decide appeals from Scotland ; and in the evidence before the Committee, allusion is made to Lords Ordinary of high qualifications who were not favourites. I think that one of these is the same individual who was proposed to be taken to the House of Lords. Had that Judge, at his first appointment to the Bench, been entitled to take his seat in the Inner House, he must, from his reputation as a lawyer, have added great weight to the Bench ; and I believe much greater than it was possible he could do after he had been twelve years a Lord Ordinary, and had become not a favourite Ordinary. The situation of permanent Lords Ordinary may be calculated to narrow the mind,—there is certainly nothing in the nature of their duties to enlarge it.

2. *As to the Bar.*—The distribution of the Judges into Lords Ordinary and Judges of the Inner House is also injurious to the Bar. From the smallness of the Courts—as they are termed by the English lawyers, but which might be more accurately described as *Cribs*—in which the Lords Ordinary hear causes debated, the Bar is effectually excluded from hearing the discussion. They know nothing of what goes on before the Lords Ordinary, and only learn from the printed reports their decisions in cases which had been considered ill decided. They are also prevented from having an opportunity of attracting general attention in the debates which they do conduct, and which necessarily assume a conversational tone ; and, from the way the business is conducted in the Inner House, the Bar is prevented from understanding what is going on. Even with the lengthened statements of counsel suggested in the Report, I apprehend that when the Judges of the Inner House are furnished with a copy of the record, and interlocutor and note by the Lord Ordinary, the statements of counsel will never be so full as to enable the Bar, without having possession of these papers, to form a correct opinion of what is going forward.

3. *As to the Parties.*—The distribution of duties among the Judges, I consider to be a grievous injury to the parties, and the great source of appeal to the House of Lords. In the Report it is stated to be a great object in judicial discussion “to put down in the party the conceit of his cause, while it raises his opinion of the patience and solicitude of the Judge.” I think no arrangement better fitted for preventing that conceit being put down than the system of permanent Lords Ordinary.

Prior to 1825, four decisions by the Court of Session were necessary. By the Judicature Act they were reduced to two, viz., one by the Lord Ordinary, and one by the Inner House. It may be very agreeable to the counsel to observe the patience of a Lord Ordinary in preparing and deciding cases; and the distinctions between judgments of the Lord Ordinary and the Inner House are perfectly understood by practitioners in the Court of Session, but I conceive they are not understood by the public at large. Where a party unacquainted with these distinctions brings an action in the Court of Session, he does so in the belief that he will obtain the deliberate decision of the Judges of that Court. In the course of the action, however, he learns that there must be a decision of the Lord Ordinary before there is a decision by the Inner House. After perhaps two years' litigation, he receives a letter from his agent, informing him that the Lord Ordinary has decided the case against him, sending him a copy of the interlocutor and of the note issued by the Lord Ordinary, and telling him that he may still obtain a decision of the Inner House, if he is willing to pay the additional expense. If his counsel shall advise that the interlocutor should be acquiesced in, and if he takes that advice, he will acquiesce in the decision more from regard to his counsel's advice, and to save further expense, than from a feeling that his case has been well decided. Supposing, however, his counsel advise him to submit the interlocutor to review, or if, contrary to the advice of counsel, he shall direct the case to be submitted to review, he is not likely to be satisfied with the decision by the Inner House if it is against him. He will, in either case, think the Court has been misled by the note of the Lord Ordinary, and, if the case is of sufficient importance, an appeal to the House of Lords will be entered. If he does not enter an appeal, he will leave the Court dissatisfied.

Supposing, again, that the decision of the Lord Ordinary is altered, the opposite party must either acquiesce or carry it to appeal. In ordinary circumstances, if the case is of sufficient importance, an appeal will be entered. If, however, an appeal is not entered, it is not reasonable to suppose that he will have acquiesced from the conceit of his cause being put down. No reasoning of lawyers will ever convince him that by the forms of Court it was necessary that a wrong decision should be pronounced in his favour by the Lord Ordinary, before a right one was pronounced by the Inner House, in favour of the opposite party. He will, therefore, think the inter-

locutor of the Lord Ordinary was right, and will leave the Court dissatisfied.

How different would be the effect upon litigants if, in place of being tormented with a decision of the Lord Ordinary, they at once received the decision by a Court of four Judges ! If the decision was unanimous, and counsel thought it right, the party would at once acquiesce, and the conceit of his cause would be put down.

Believing that it is wrong to force the parties to take a decision by a Lord Ordinary, which must, of course, dissatisfy one of the parties to the suit, and, further, believing that the parties would not apply for such a decision if they were not obliged to obtain it, the following alteration in form would give an opportunity for ascertaining the views of the public on the subject. When a case is enrolled in the Outer House Rolls for the first time, the party has his choice of going to any of the five Lords Ordinary. In addition to this choice, let the party have the power of not enrolling the case before any of the Lords Ordinary, but at once before one of the Divisions of the Inner House. If every case was enrolled before the Divisions and none before the Lord Ordinary, which I think would be the case, it might be held to be satisfactorily established, that these preliminary decisions were not wished for by the parties.

The views I have now stated are not new to me. When in the year 1823 I was required by the Commissioners, on whose Report the Judicature Act was passed, to give my opinion, I stated that in place of there being four decisions, there should only be one ; that there should be no decision by a Lord Ordinary ; and that the Judges should be reduced in number from fifteen to twelve, and formed into three Courts of four Judges each, similar to the Courts in Westminster Hall, the individual Judges preparing but not deciding the cases. I believe I was the only practitioner who proposed a change in the constitution of the Court. My opinion will be found in the Appendix to the Report of the Commissioners who sat in 1823 ; and I have no doubt that, so far as it was noticed at all, it was considered very presumptuous. All my subsequent experience and reflection, however, confirm the opinion I then gave, both as to the constitution of the Court and the mode of making up the record.

## NOTES IN THE INNER HOUSE.

## SECOND DIVISION.

*M'Callum v. The Forth Iron Company.*—June 12.

QUESTIONS arising out of an allegation of nuisance appear at first sight to be of a comparatively insignificant character. In reality, however, the reverse is the case. In this commercial and manufacturing age, a great many bad smells, for instance, have come into existence, which the olfactory nerves of our ancestors were never called upon to endure. These odours may be uncommonly disagreeable to those who snuff them up; yet they are often indications of the proximity of some great work, that adds to the wealth of the country, and supports hundreds of workmen and their families. The same may be said in a still higher degree of those black clouds of smoke that hang for ever over the great iron-producing districts of our country. That which is disagreeable to the senses is thus, nevertheless, the necessary accompaniment of operations involving vast interests. The Courts of this country are therefore, as a general rule, rather chary of meddling hastily in such cases, where to take a disagreeable odour out of one man's nostrils might involve the taking away of the bread out of a hundred persons' mouths. In the case of *M'Callum* against the Forth Iron Company, decided this session in the Second Division, the Court had a plain ground of judgment to go on, in refusing the interdict sought by the complainer; for the evidence proved that the nuisance had not been brought near him, but that he had come near it. The complainer, who had built a house in a mining village within 244 yards of a calcining heap, raised this process of interdict to prevent the defenders from calcining another heap at the distance of 85 yards. As the Lord Justice-Clerk remarked, the complainer having come to the nuisance with his eyes open, could not now complain; and to grant such an interdict would be a precedent for chasing iron-masters out of Scotland,—rather too serious a matter for the prosperity of the country to be done hastily.

## FIRST DIVISION.

*Aitken and Others v. Fraser.*—July 20.

Another case, raising questions of a more nice nature, occurred in the First Division just before the close of the session. This was the case of *Aitken and Others v. Fraser*. Some persons describing

themselves inhabitants of the village of Broxburn and the neighbourhood, complained that, from the defender's bone-works there, on the south side of the turnpike road between Edinburgh and Glasgow, the most noisome and offensive effluvia proceed, which form an intolerable nuisance in the village of Broxburn, and are injurious to the health of its inhabitants, and others passing along the road. The defenders raised the objection, that the pursuers, not having averred that they possessed property, or were anything more than mere casual residents at Broxburn, had no title to sue for such an interdict. The point, therefore, that came before the Court, was whether mere inhabitancy in a town or village was a sufficient title in a question of this nature. The First Division, after taking the case into consideration, granted the issue sought by the pursuers, to try whether the defender carried on the manufacture on his premises, so as to produce noxious or offensive gases or effluvia, to the nuisance of the pursuers, *as inhabitants* of the said town or village. It must be remarked, however, that in this case, unlike that of M'Callum, mentioned above, the pursuers averred that they had all commenced their residence in Broxburn at a period antecedent to the commencement of the nuisance.

## SECOND DIVISION.

*Wallace and Others v. Wallace and Others.*—July 17.

Some useful remarks of a practical nature were made by the Court in this case, immediately previous to the close of the session. The action was one of proving the tenor. The late Mrs Russell, by a codicil to her trust-deed, had excluded her daughter Anne from sharing in the distribution of her property. It is averred by the pursuers, that by a subsequent codicil the testator altered this distribution, and gave Anne a seventh share of her property; and that this codicil was left by Mrs Russell in the possession of Mr J. Steven, a writer in Glasgow, and was last seen in the hands of Strachan, his clerk, but has since been lost, and cannot be found. As adminicles, they produce the scroll of the codicil, and a full copy made from it; and they propose to adduce the subscribing witnesses, and the notaries who signed for Mrs Russell, who could not write. These averments were now held by the Court to be insufficient. The pursuers were ordered to amend their averments, and to state precisely when the deed had last been seen, and how soon afterwards it

was missed ; why it was in the hands of Strachan ; where he put it ; and in all respects to make their statements minute and precise.

This order of the Court conveys a useful, practical hint to those who may be engaged in getting up an action of proving the tenor. Parties are too apt to think that when they have merely stated the *amissio*, they have complied with the rules of law, which require that they should state the *casus amissionis*,—a very different thing. They ought not merely to state the fact that the document was lost, but the way in which it came to be lost, and that in a careful and exact manner. It is true that deeds which are intended to remain constantly with the grantee, and others of a similar nature, are excepted by our institutional writers from the more stringent rule ; but they only form an exception, and in all other cases the circumstances attending the loss of the document must be distinctly set forth. In the case of deeds of a testamentary nature especially (of which the present is an instance), it is obvious that a very strict rule must necessarily be applied, on account of the possibility—and sometimes the probability—that if the documents were ever executed, they were cancelled by the orders or authority of the testator himself. A most circumstantial account of the *casus amissionis* is, therefore, in such cases indispensable.

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#### THE MONTH.

*The Parliamentary Session.*—In a few days—probably before these pages are in type—the streams of Parliamentary eloquence will have ebbed away, and the services of the gentleman who rejoices in the funeral appellation of Black Rod will be in requisition to celebrate the obsequies of the expiring session. If our legislators are sometimes roundly taken to task for their inattention to the business of the country, they certainly cannot avail themselves of the pleasant excuse put forward by the genius of the East India House, when he confessed to coming late to the office in the morning, but urged in extenuation that he made up for it by going away early ! Our senators, on the contrary, are doubly condemned, inasmuch as they not only commenced business early, but have continued the sittings unusually late ; and yet, with both these advantages in their favour, they have done little but squandered the public time in useless discussions, leaving scarcely a trace of practical legislation on the statute book.

The misfortunes of the session commenced with that *chef d'œuvre* of legislative hypocrisy, the Reform Bill. Lord Palmerston is doubtless already convinced that he had much better have left the subject alone. Saul among the prophets could not have felt more completely out of his element, than the disciple of Pitt and Sidmouth among the Parliamentary reformers of the present generation. Nobody could be expected to believe that a Reform Bill inaugurated by the Janus of Downing Street was intended to pass; and this prestige of insincerity which the Bill derived from the accident of its birth, was not effaced by the means employed or the persons selected to take charge of it in the House. Lord John Russell may have faith in Reform; but the public perhaps do not repose implicit confidence in his Lordship's generalship. Did the reader ever think of putting the question to some veteran stager of the road, why a certain horse, notorious for getting upon its knees, was selected to lead his team? We know what the answer would be, —as he had been down so often already, he'd be all the better able to take care of himself. We might almost fancy some such idea had predominated when Lord John Russell was called from the management of foreign affairs to work the Reform coach in its uphill journey through the House of Commons unassisted. The Minister who had broken down under the Reform Bills of 1852 and 1854 was just the man to trust single-handed for a steady and unflinching pull at the Bill of 1860! Seriously, we fear the leadership of Lord John will go far to ruin any future project of Reform that may be associated with his name. His Lordship introduced the measure, as some one observed at the time, in a speech pitched at a tone appropriate enough, had the subject been a turnpike trust, but immeasurably below the level of the occasion. Ministers of the Whig school have yet to learn that constitutional questions are not to be used as mere decorative appendages, to enhance the importance of individuals who may have acquired a traditionary claim to represent them. Such changes ought either to be entered on with zeal, as Mr Gladstone did with the French Treaty-budget, and with the determination to stake the existence of the Cabinet on the issue; or it should be left to more favourable times and more willing instruments to see them carried into effect.

The public have also a right to expect that the next Bill will be more comprehensive in its plan and more carefully drawn than the abortive measure of this session. There is really no use in attempting



to hoodwink opposition by professing to deal only with the franchise, when the effect of this procedure is simply to throw over the larger question of the arrangement of constituencies to another session. Nor is it the most judicious mode of getting rid of the bugbear of numbers, to exclude all but the least instructed and the least independent class of the community from the newly created electoral body. A constituency of 700,000 may be safer, more trustworthy, and more conservative in the truest sense, than a constituency of 500,000; if the additional 200,000 includes, as it ought to do, a large class of intelligent and well-conditioned persons who are excluded from the franchise in consequence of *not being householders*. The want of a lodger franchise, or something equivalent, was the fatal blot in Lord John Russell's Bill, which justified Mr Disraeli's complaint about the "hard uniformity" of franchise, and gave at least a semblance of reason to the passionate invectives against that democracy of which the Bill was supposed to be the harbinger.

On the Law Reforms of the session, it will be charitable to say as little as possible. The English Bankruptcy Bill was intended to abolish the distinction that still prevails between bankruptcy and insolvency; to do away with a number of petty tribunals that infest the bye-ways of commerce, and to assimilate the English bankruptcy procedure in some respects to our own system. It was the fruit of much labour and forethought; and though susceptible of numerous amendments, it was unquestionably such a measure as would have passed, if honourable members had at heart the credit of their House and of the Parliamentary system, rather than their own personal reputations. The Reform Bill was said to have fallen a victim to a species of assassination. The fate of the Bankruptcy Bill may be likened to that which threatened the sleeping hero of Swift's romance, when a whole army of Lilliputians brandished their diminutive weapons over every inch of his body. There is only one way of checking this sort of guerilla opposition to the measures of the Government. Let some one, for the love of the British constitution, hunt up a good party question, warranted to last four or five years, and calculated to attract to itself all the party jealousies and antipathies of the Legislature. Then, at least, it may be hoped that the comparative insignificance of Law Reforms, as seen through the medium of party spirit, might protect them from injury, and ensure for such measures a tranquil passage through the committees of both Houses.

Amongst the articles saved from the general wreck at the end of the session, a few spars as usual have floated northwards. We refer especially to the Conjugal Rights Bill, and the Titles to Land Amendment Bill. We are heartily glad to learn that the improvements we have so often urged in the mode of taking proof in consistorial causes, and which were embodied in the Report of the Faculty of Advocates, are to be carried out. There cannot be a doubt that the judge, who is to decide on the import of the evidence, ought to have the opportunity of hearing it, and should not be put to the disadvantage of receiving it at second-hand in the form of a narrative report. The system of trial before a single judge has worked admirably in the English Court of Divorce; and there can be little doubt that it is to the example of that lately established tribunal that we may attribute the introduction of this salutary principle into the procedure of the Court of Session. While approving generally of the Faculty Report, we felt called upon at the time to protest against the sanction it gave to an unscientific innovation in the law of jurisdiction. We are, therefore, not surprised to find that the law Lords have rejected the *locus delicti* as a ground of jurisdiction, and adhered to the time-honoured rule which obliges the party to seek his remedy in the court of the defender's domicile. *Actor sequitur forum rei* is a maxim too deeply founded in natural justice to be lightly shaken; and while we willingly acknowledge the learning of those who are more immediately responsible for the report in question, we cannot think the strictures passed upon this portion of it in the committee of the House of Lords, either uncalled for or unjust.

*The Tariff.*—In any estimate that may be formed of the value of this session's proceedings, the financial policy of the Government must occupy a conspicuous place. We do not refer specially to the Commercial Treaty, nor even to the expediency of remitting the paper duties—questions which have given rise to considerable difference of opinion. But the policy of reducing taxation on articles of general consumption, and of sweeping away petty imposts as a class, is no longer a question of party, but of national policy. However certain organs of opinion may sneer at the simplification of the tariff, we know that it has been felt and appreciated as a great boon in mercantile circles. We are curious, however, to know why the article of *tobacco* should be the only exception to the principle of equalizing the duty between British and foreign manufactures. The duty on foreign manufactured tobacco is avowedly a protective

duty, and virtually a prohibitory one. Foreign Cavendish is scarcely to be had by retail ; and, if one does occasionally meet with an epicure who smokes an undeniable Havannah, it is fair to infer that the number of smokers of good tobacco would be largely increased, and the revenue augmented, if a just proportion were observed between the duties chargeable on the manufactured and unmanufactured articles. Tobacco manufactured from the fresh leaf is allowed to be more wholesome than that of European manufacture ; and yet this differential duty is retained ostensibly as a tax upon luxury, but really with no other effect than that of protecting the manufacture of an inferior commodity.

*Mr Evelyn at the Guildford Assizes.*—A sage philosopher is reported to have announced the discovery that all mankind were more or less deranged, the difference between sanity and insanity being, according to this view, merely a question of degree. A fresh illustration of the truth of the maxim is afforded by the eccentric conduct of that worthy representative of the great unpaid, whose name is prefixed to this paragraph. Mr Evelyn's monomania—his "particular vanity"—takes the shape of an unquenchable thirst for being fined L.500. There is no freak so absurd, but somebody will be found to commit it, for the love of notoriety. One fanatic is bent on throwing himself from the top of the Monument ; another, from the summit of Mont Blanc, shouts "excelsior," and will insist on mounting the shoulders of his guide, that he may occupy, in his own seeming, the position of the "highest" personage in Europe. Mr Evelyn's craving for notoriety has taken a form less hazardous to himself, and which is only innocuous on the score of example, because the whim is too expensive to be followed by any one whose fortune does not entitle them to aspire to the office of High Sheriff. We need not repeat the story—a summary of it will be found in another page. As to the justice of the sentence, we have only one observation to make. Our countryman, Mr Justice Blackburn, stood on perfectly correct ground, when he declined to go out of the usual course to thank the magistrate for an *extra* attendance, which was not dictated by respect for himself or zeal for the administration of justice, but intended simply as a compliment to the High Sheriff. We think it is bad policy, however, to impose heavy fines, with the expectation of extracting an apology ; because the moral effect of a retraction is most conspicuous when it comes as the spontaneous expression of a calmer judgment, aided, it may be, by the advice of

friends, but not suggested by the aggrieved party himself. Mr Justice Blackburn ought to have fined the Sheriff L.50 without reprimand, and left the matter of further reparation to his own good feeling and honour. Mr Evelyn's second escapade was justly visited with a heavy pecuniary penalty, being, as the Lord Chief-Justice described it, in his very impressive yet courteous address, "a most improper, illegal, and deliberate contempt of Court, and of the administration of justice." It has not been generally noticed, that the necessity for clearing a portion of the Court, which aroused the susceptibilities of the High Sheriff, was occasioned by the fault of that gentleman himself and his brother magistrates. It rests with the magistrates of the county to provide the requisite accommodation for the English Courts of Assize; but, although the attention of the Surrey bench of magistrates had been repeatedly called to the defective state of the Court-house (which is described by the judges as being the most inconvenient in the kingdom), no steps were taken to remedy the evil; and, to crown all, the elected representative of the justices issues his manifesto, announcing that all verdicts returned at that assize are null and void, because her Majesty's judges have found it necessary to exclude the public from a portion of the hall, in order that evidence may be taken without interruption. Mr Evelyn's ambition ought now to be satisfied. He has succeeded in bringing the precious document under the cognizance of the Court whose proceedings he derides, and he has been permitted to contribute L.500 to the funds of the public exchequer. What will the great unpaid do next?

*Justice Showing its Paces.*—The English Chancery judges are rather touchy at the mention of delay in connection with their proceedings. The other day, Sir John Stuart took to lecturing a solicitor in good round terms for his presumption in writing to the newspapers, to complain of the dilatory conduct of a registrar. We don't think the public here will be interested in the details of the controversy; but, so far as we can judge from perusing the Chancery Reports, we believe there never was less ground for complaint on the score of delay. The punctuality and despatch exhibited in the conduct of cases by the Courts of Chancery is an example to all other tribunals in Britain. Just take the case of the *Westminster Palace Hotel Co. v. Simpson* as an example—a favourable one, no doubt. This case, which raised an important question as to the powers of directors to deviate from the objects contemplated in the

contract of copartnery, has been carried through all the possible stages within *three months*; and a judgment of the House of Lords has been obtained, confirming the decision of the Vice-Chancellor and of the Lords Justices' Court. By way of contrast, we may refer to the case of *Billites v. Young's Assignees*, lately decided by the House of Lords, on appeal from the Common Law Courts. The litigation has lasted since 1853; and, in the various stages of hearing, the opinions of *nineteen* judges have been taken, of whom ten were in favour of the ultimate decision, and nine were of a contrary opinion. The question which has vibrated so long in the judicial balance is simply, whether an action of "trover" is the proper mode of recovering the value of property sold under a warrant by a person who had acquired a fraudulent preference from an insolvent.

### Legal Intelligence.

SCOTCH APPEAL BUSINESS, 1860.—The following is a list of the Scotch Appeals heard and decided during the present session of Parliament, showing the number of days they were argued, from which Division of the Court of Session brought, and the fate of each appeal:—

<i>Name of Case.</i>	<i>No. of Days Argued.</i>	<i>From which Division of Court of Session.</i>	<i>Result.</i>
Johnson v. Johnson, . . . . .	2	Second.	Affirmed.
Commercial Bank of Scotland v. Rhind, . . . . .	2	Second.	Reversed.
Glasgow, Barrhead, and Neilston Railway Co. v. the Caledonian Railway Co., . . . . .	2	Second.	Reversed.
Kerr v. Wilkie, . . . . .	2	First.	Affirmed.
Ewing v. Crauford, . . . . .	2	First.	Affirmed.
Wryghte v. Lindsay, . . . . .	3	First.	Affirmed.
Davidson v. Tulloch, . . . . .	3	Second.	Affirmed.
Maxwell v. Maclure, . . . . .	2	First.	Affirmed.
Caledonian Railway Co. v. Lockhart, . . . . .	3	First.	Affirmed.
Cunningham v. Fairlie, . . . . .	2	Second.	Affirmed.
Drew v. National Exchange Co. of Glasgow, . . . . .	4	First.	Affirmed.
Orr v. Glasgow, Airdrie, and Monkland Railway Co., . . . . .	2	Second.	Affirmed.
Grant v. Livingstone, . . . . .	2	First.	Affirmed.
Lord Saltoun v. Lord Advocate, . . . . .	2	Both.	Reversed.
Houston v. Provost of Glasgow, . . . . .	1	Second.	Affirmed.
Henderson v. Johnson, . . . . .	1	Second.	Affirmed.
Kerr v. Balfour, . . . . .	1	First.	Withdrawn.
Caledonian Railway Co. v. Colt, . . . . .	2	Second.	Reversed.
Menzies v. Menzies, . . . . .	2	Second.	Part Heard.
Cairncross v. Lorimer, . . . . .	2	Second.	Affirmed.
Aikman v. Aikman, . . . . .	7	Second.	Postponed.

**APPOINTMENT.**—The Lord Advocate has appointed Mr William Duncan, S.S.C., to the office of the Principal Extractorship of the Court of Session, vacant by the death of Mr John Parker.

**THE LORD JUSTICE-GENERAL IN THE HOUSE OF LORDS.**—During the hearing of a Scotch appeal before the Law Lords lately, the Lord President of the Court of Session, in the course of his vacation rambles, happened to stumble into the House of Lords, and, with other bystanders at the bar, listened enchained by the silver tongue of the Attorney-General. Lord Brougham, still distinguished for his long sight for illustrious strangers, soon descried the able head of the Scottish judicature, and immediately leaving his seat, hastened towards him with gestures of recognition and welcome. With that impulsive hospitality and love of nationality which distinguish the great ex-Chancellor in this "at home," he at once beckoned the Scottish judge towards the door of the House, and, by his own spontaneous prerogative, invited him to enter from the bar and take his seat; and, notwithstanding decided symptoms of demurrer on the part of the prudent Scotch judge, his Lordship, without further ceremony, seized him at once by the arm, and drew him within the "thin brown line" that divides legality from illegality. Once called within the bar, the learned judge (still under duress) was led towards the Lord Chancellor, sitting in the middle of the house, whose consternation neither prevented him from warmly shaking by the hand his brother chief, nor at the same time from casting prudent glances round to see if Lord Redesdale was near, and then back towards the woolsack, as the ultimatum of their new colleague. The Lord President was thereupon promptly conducted, and left high and dry on that venerable bulwark of horse hair, where he had for ten minutes the satisfaction of witnessing from a safe distance the expiring convulsions of the Attorney-General's peroration in an argument on a Scotch domicile. Lord Brougham, when this break in the arguments occurred, apparently not quite contented, but still bent on some further and more expressive demonstration of nationality and comity, proceeded to propose something to the Lord Chancellor, and then to Lord Wensleydale; but while engaged in the latter arduous operation, the learned Scottish judge quietly withdrew from his uplifted and precarious position, not, however, without being swiftly pursued through the resounding vestibules in the distant vista by Lord Brougham, whose agility, "when not clothed with legal habiliments," is still the wonder of his contemporaries.—*Scotsman*.

**IRELAND.**—**THE ORANGEMEN AND THE JUDGES.**—Under the head of "More Insults to Catholic Judges," the *Freeman's Journal* publishes the following despatch, dated "Londonderry:"—The two Catholic judges, Chief Justice Monaghan and Baron Hughes, were deliberately insulted here to-day by the Orangemen and apprentice boys. During the night a large "orange and blue" flag, with King William in the centre, was hoisted on Walker's Monument. Under the very shadow of this had the two judges to pass in coming to court. No allusion, however, was made to the insult from the bench. The Mayor sent repeatedly to have the flag removed, but no attention was paid to his remonstrances, until a body of police were ordered to haul it down. It remained up until after twelve o'clock. A strong feeling of indignation has been excited by this outrageous conduct of the Orange party. There are some days on which it is customary to exhibit party flags in Derry, but this is not one of them, and the only object of the Orangemen must have been to put a studied insult on her Majesty's judges after the Enniskillen model.

**AN EXPEDITIOUS CHANCERY SUIT.**—A case has just been decided, which, perhaps, affords the only instance of a suit in Chancery having gone through all the courts, and received a judgment of the House of Lords, within three months. It is that of the Westminster Palace Hotel Company. In the year 1857 this

company was formed for the purpose, as stated in its memorandum of association, "of establishing an hotel, carrying on the usual business of an hotel and tavern, and doing all such things as were incidental or otherwise conducive to the attainment of the above objects." Having almost completed their building, and having spent nearly all their capital, they thought it prudent to let a portion, consisting of nearly half of the premises, to the India Board for three years, with option to make it five, at a rent of L.6000 per annum—about 12 per cent. on the money expended—retaining, for the purpose of casual custom, the remainder of the building, such remainder being larger than the Great Western Hotel. A shareholder, however, objected, and filed a bill in the Court of Chancery to restrain the company from carrying out the agreement. This was on the 17th of May last. The suit was heard on the 31st of May by Vice-Chancellor Wood, who decided that the agreement was within the powers of the company, and was binding. The plaintiff appealed to the Lords Justices, who, on the 11th of June, heard the appeal, and, Lord Justice Knight Bruce agreeing with Vice-Chancellor Wood, the judgment was confirmed. The plaintiff then appealed to the House of Lords, and the appeal was heard by their Lordships on Tuesday, when the former judgments were unanimously confirmed. The question involved in the suit was, whether a company for establishing an hotel on a scale of unusual magnitude might not let part of it for a short time, in a manner to establish a connection, and otherwise exercise a discretion in the mode and manner of commencing its business; and the result is, that the power to do so has been definitively affirmed.

**AN AFFIDAVIT.**—The following is the copy of an affidavit (except as to the names of the parties to the cause) recently sent from the County Court of Norwich to the Bromley County Court of Kent:—

In the County Court of Kent, holden at Bromley.

A——— v. B———.

I, R——— P———, of the city of Norwich, one of the bailiffs of the County Court of Norfolk, held at Norwich, make oath and say, that I did, on the twentieth day of June 1860, duly serve the defendant with a summons, a true copy whereof is hereunto annexed, marked b, at Norwich, but was unable to do so, the defendant being on high duty; but if you send the time of the next court, we can serve it.

Sworn at Norwich the ninth day of July one } R——— P———.  
thousand eight hundred and sixty.

Before T. H. P., a commissioner for taking affidavits in the Court of Queen's Bench at Westminster.

**GUILDFORD ASSIZES.**—A singular scene occurred in the Crown Court at Guildford.—Mr Justice Blackburn presiding:—About the middle of the day the grand jury, having concluded their business, came into Court with the remainder of the bills, and the judge dismissed them, thanking them in the usual form for the assistance they had rendered to the administration of justice. It appears that the High Sheriff of the county (Mr Evelyn) had requested the learned judge to pay the compliment to the gentlemen who had attended, but who had not actually served on the grand jury, of thanking them for their attendance, as many of them had come a considerable distance to perform the duty; but the learned judge said he considered it unnecessary to do so, and it was understood that the High Sheriff expressed his intention of thanking them himself. When the learned judge addressed the grand jury he was about to proceed with a trial that was before the Court, when the High Sheriff rose, and, addressing a number of magistrates who were on the spot, said that he also—Mr Justice Blackburn interposed, and said that he could not allow the High Sheriff to proceed, and he must request him to desist. The High Sheriff seemed determined to go on, when the learned judge laid his hand gently on his shoulder, and said he really could not permit him to speak. The High Sheriff still persisted, and Mr Justice Blackburn threatened that if he did not desist he would fine him. This

had no effect; the High Sheriff would not sit down, and Mr Justice Blackburn said, "Mr High Sheriff, I feel myself called upon to fine you L.500." His Lordship then directed Mr Avory, the deputy-clerk of assize, to record the fine. The imposition of the fine did not have the effect of inducing the High Sheriff to desist, and Mr Justice Blackburn then threatened to commit him for contempt of Court, and interfering with the administration of justice. The High Sheriff then resumed his seat, and the event caused great sensation among the magistrates, who were very numerous in the town, and the bar. It was reported that a correspondence had passed, in which Mr Justice Blackburn offered to remit the fine, and that Mr Evelyn, in answer, only sent the judge a check for the money. Afterwards, Mr Scarlett and other gentlemen were seen to be in conversation with the Chief Justice in the other court, and the result of this was at last seen by the High Sheriff coming into court and reading a written apology, in which he expressed his sorrow for having committed any act which might bear the semblance of a contempt of the Court. Mr Justice Blackburn stated that he had no personal feeling, but must protect the dignity of the Court, and could not allow any improper interruptions to the business of the assize. He then remitted the fine, and the affair terminated. About a week after this event, some sensation was created by bills being posted at the entrance of the courts, signed by the High Sheriff, complaining of the Court of Justice (Blackburn) being closed; that it was against the law, and desiring his men to refuse to obey the orders of the judges, should any be given to keep the people out. The High Sheriff, Mr Evelyn, was in consequence brought before the judges, when he contended that no judge of the land had a right to close a court of justice, and that was the reason why he issued the placard. Lord Chief-Justice Cockburn, amidst the most profound silence, then addressed the High Sheriff in a most solemn manner. He said, Justice Blackburn had only partly closed the Court on account of the noise from without and the lower end; and in so doing he was perfectly justified. The course adopted by the High Sheriff was an insult to the Queen and the Judges. He acquitted him of any sordid motive, but he had been guilty of contempt of Court, for which he fined him L.500.

#### APPEAL IN THE HOUSE OF LORDS.

ORR *et al.*, Appellants, v. GLASGOW, AIRDRIE, AND MONKLANDS RAILWAY COMPANY, Respondents.—April 24.<sup>1</sup>

This was an appeal from a decree of the Court of Session.

The appellant and others were shareholders in the Glasgow, Airdrie, and Monklands Junction Railway Company, and instituted a suit against the directors of the company, and the company itself, to set aside certain resolutions and orders which had been made by the directors for calls; also to obtain from the directors an account of the whole sum of money received by them on behalf of the company, and to recover back from the directors a sum of L.2000, or such other sum as should be found to be the amount of the appellants' shares.

The Glasgow, Airdrie, and Monklands Junction Railway Company was incorporated by an Act in 1846, for the purpose of making a railway from Glasgow to Airdrie. The capital of the company was to consist of 16,000 shares of L.25 each; the accounts were to be balanced each year at 31st January and 31st July; there were to be eleven directors, each possessing in his own right 50 shares, with power to increase or reduce the number; the powers for the compulsory purchase of lands were not to be exercised until expiry of three years from the passing of the Act; and the railway was to be completed within seven years from the same date, and on the expiration of such period the powers of the company were to expire. A deposit of L.2, 10s. was levied at the

<sup>1</sup> Abridged from the *Weekly Reporter*.



outset on the subscribers. Afterwards, on 24th November 1846, a resolution of the directors was come to for making a call of L.2, 10s. per share, and another for the same amount, both payable September and December 1847. These calls were, it was alleged, unnecessary for any of the statutory purposes, none of which had been entered upon, and were wrongfully and collusively obtained by the directors to reimburse themselves expenses. It appeared that the plaintiffs paid the two first deposits or calls of L.2, 10s. per share. In March 1847, the directors reported to the shareholders that they had taken all necessary steps to ensure the speedy completion of the line; but no part of the railway ever was made, and the company's powers expired on 17th July 1853. The plaintiffs further alleged that the defendants were the directors, and had misapplied the funds, and defeated the object of the statute. The defendants were, in fact, interested in the success of the Edinburgh and Glasgow Railway Company, of which they were shareholders. That railway company having an interest in the plaintiffs' railway not being made, the defendants resolved to prevent its formation; with this view, and in order to acquire the absolute control of the affairs of the plaintiffs' railway, the defendants acquired 12,379 shares, in trust for, and at the risk of the Edinburgh and Glasgow Railway Company. It was further alleged that they then took advantage of their position to counteract the votes of the other shareholders, and succeeded, on 29th September 1847, in carrying an amendment for delaying the construction of the line; that they thus wrongfully opposed the formation of the Glasgow, Airdrie, and Monklands Railway, and contrived in 1849 to acquire the management of the affairs of the line; and that, in furtherance of their illegal designs, the defendants prepared a report to be submitted to the shareholders, recommending an application to Parliament to dissolve the company and wind up its affairs. The report was remitted to a committee of the shareholders, who reported that the whole object of the defendants had been to defeat the object of the Monklands Railway Act—that regular books had not been kept—that, though their proceedings were opposed, they proceeded to apply for a Bill to dissolve the company, which Bill was thrown out; and nevertheless they illegally contrived, by electing and re-electing themselves, to hold their office as directors, and to refuse to construct the railway—that the meetings which they held were unduly constituted—and that they had misapplied the funds entrusted to them, and refused to account for the same, or to repay the deposits and calls to the plaintiffs.

The Court of Session held that the plaintiffs had not set out sufficient grounds to entitle them to the relief they sought, and dismissed the suit; whereupon the plaintiffs now appealed.

The LORD CHANCELLOR.—In my opinion, these orders ought to be affirmed. The ground of appeal is respecting the validity of the orders made by the directors of this company for the two calls. Upon that point I never entertained the smallest doubt. It is not disputed that these calls were lawfully made. They were made at a time when the company was in full vigour, and they were made by those who had the right to make them. The only ground upon which it is now sought to set them aside is, that there has been a misapplication of the money raised by these calls. If there had been such a misapplication, that might have been, when it was going on, a ground for an injunction; but it cannot possibly be a ground for declaring that that was null and void *ab initio*, which we are of opinion was perfectly valid in all respects. Then we come to the claim for damages. And it must be observed that this is not, as was the case in *Davidson v. Tulloch*, W. R. ante, 309, an action founded *ex debito*, for damages in respect of a deceitful representation, or damages in respect of fraudulent conduct. It is for an account, with a view to surcharge and falsify accounts which have been rendered. Now, if this had been a common partnership, and the partnership had come to an end, and there had been assets to be distributed and accounts to be settled, I should have thought that no doubt in Scotland, as in England, a suit might have been instituted for the purpose of having the accounts adjusted and a distribution made. But that is not the nature of this

case. Here you have a joint-stock company—a corporation; and although there is not in Scotland, as there is in England, any process provided for winding up the concerns of a company when it is dissolved, there are special opportunities and means given to all the shareholders from time to time, to see that proper accounts are rendered, and that their affairs are properly conducted; and the accounts are to be periodically submitted to the general meetings of the shareholders, and balances are to be struck. Now it seems to me, that, under these circumstances, until there has been a complaint made, and until there has been an effort made to obtain justice by applying to the company, this mode of bringing an action at the suit of one or of several of the shareholders, is incompetent. It may probably be unnecessary. At all events, it would be right to try what could be done without appealing to a court of justice. Such an appeal to a court of justice, under such circumstances, evidently leads to the most inconvenient consequences; and unless it be absolutely necessary, I think it ought not to be permitted. Now, here there has been no complaint at any public meeting of the company as far as we know, and no attempt to make any such complaint of the accounts rendered, or to call a meeting for the purpose. There are means of calling a meeting, but none of them have been resorted to. But this action is brought by several gentlemen against the company, and against the directors of the company; and I think that, according to the analogy of the cases that have been decided in England, which rest upon principles that are equally applicable to Scotland, this ought not to be permitted. If one shareholder is allowed to bring such an action, then each individual who has a different complaint of his own on different parts of the accounts which have been rendered may follow the example, and the company may be torn in pieces and utterly ruined by the litigation in which it is involved. It seems to me, therefore, that this is a case in which, in the first instance, until application has been made to obtain justice by the means which the Legislature has put in the possession of every shareholder, such an action cannot be maintained. His Lordship concluded by moving that the appeal be dismissed with costs. Lords Cranworth and Kingsdown having concurred, the appeal was dismissed.

## English Cases.

**ELECTION—Auditor.**—The Corrupt Practices Prevention Act provides that “Nothing in this Act contained, except as herein specially provided, shall be taken to limit the right of any creditor to bring any action, or otherwise to proceed against a candidate for or in respect of any expenses connected with the election; and if in any such action or proceedings, final judgment be obtained against the candidate, such candidate shall forthwith send to the election auditor a copy or certificate of such judgment.” *Held*, in construing this clause, that a candidate may incur an election expense notwithstanding the appointment of an agent for election expenses, and that an election expense incurred by the candidate can be paid only through the election auditor; but the creditor may sue the candidate.—(*Norton v. Dickson*, 8 W. R. 530.)

**JURISDICTION—Domicile.**—This was a petition for a dissolution of marriage at the suit of the wife, by reason of the husband's adultery and cruelty. There was no appearance on the part of the respondent. On the evidence, a question arose as to the domicile or origin of the respondent being Irish, and the Court

took time to consider how far this might affect its jurisdiction. The circumstances of the case are sufficiently stated in the following judgment:—The Judge Ordinary—This was a petition for dissolution of marriage by Charlotte Bond, on the ground of the adultery and cruelty of her husband. The petitioner was an Englishwoman. On the 28th July 1840, she was married to the respondent in England; they then went to live at Clifton, from thence they went to Ireland to the house of respondent's father; not long after they returned to England, and lived some time in London. In 1843, they were at the house of a sister of the petitioner in Warwickshire, when she was treated with great cruelty by the respondent. They afterwards again went to Ireland, but returned to England in 1845, bringing with them a servant named Hegan; this woman shortly afterwards returned to Ireland, and the respondent went there also. In the same year the petitioner went to Ireland to her husband, who was then living at a place called Grange Hall. Soon after her arrival, she found that the respondent was living in open adultery with Mary Ann Hegan; she was there again treated with great cruelty by the respondent, and shortly after returned to England to her friends. She has not since seen her husband, nor did she hear from him until 1860, when he was living in England, where he was served with the petition. According to this evidence the petitioner was English, and therefore had a right, according to the 27th section of the Divorce Act, to present her petition; but the respondent appears to have had a residence in Ireland, from which, if that evidence stood alone, it might be inferred that his origin was Irish; and Ireland, for the purpose of this question, must be treated as a foreign country. If the evidence on this point had been so cogent as to compel the Court to take notice that the respondent's domicile was not English, we must have decided whether or no the Court can, consistently with the principles of international law, assume a right to adjudicate on a petition presented against a foreigner who is served abroad with a citation to which he does not appear. But the marriage was solemnized in England, and the respondent afterwards lived with his wife at various places in England; and although he has not appeared and submitted to the jurisdiction of this Court, he has not contested it, and we do not find evidence of so conclusive a nature as to compel us to deal with him as an Irishman. The case is therefore the same in substance as *Deck v. Deck*; and our decree is that the marriage be dissolved, and the respondent condemned in costs.—(*Bond v. Bond*, 8 W. R.)

*WILL—Vesting.*—Edward Prichard, the elder, by his will, dated the 3d of June 1851, directed his executors to invest his personal estate, after payment of his debts, etc., upon the trusts therein expressed. The will then provided that—“As to the sum of L.5000 sterling, or the stocks, funds, or securities upon which the same shall be from time to time invested, upon trust, to pay the dividends, interest, and produce thereof unto my said wife for and during the term of her natural life, to and for her own absolute use and benefit; and from and after her decease, upon trust, to pay, transfer, and assign the said trust sum of L.5000, or the stocks, funds, or securities upon which the same shall be invested, between my said son, Edward Prichard, and my said grandson, Arthur White, in equal shares and proportions; and in case of the death of either of them in the lifetime of my said wife, then upon trust to pay the whole of the said trust fund of L.5000, and interest as aforesaid, unto the survivor of them, the said Edward Prichard and Arthur White, his executors, administrators, or assigns.” The testator having died soon after making his will, his son, Edward Prichard, having died in 1856, and his widow, and the plaintiff Arthur White, his grandson, being still alive, the question arose upon the construction of this clause, viz., whether Arthur White, the grandson, was entitled to a vested and indefeasible interest in the funds now representing the said sum of L.5000, subject to the life interest of the testator's widow therein? *Held* by the Lord Ch. and Lords J. J., on a special case (reversing decision of the M. R.), that the question must be answered in the affirmative. The Lord Ch.—“I am of opinion that this question ought to be answered in the affirmative. According to the

grammatical and natural meaning of the language of the will, such, I think, must be taken to have been the intention of the testator. In case either the son or grandson should die in the lifetime of the widow, the whole sum of L.5000 was to go to the survivor of the son and grandson, his executors, administrators, or assigns. The survivorship is that of the son surviving the grandson, or the grandson surviving the son. The ultimate disposition of the fund was to be determined on the death of the son or grandson in the lifetime of the widow, without any consideration as to either of them surviving the widow. According to the contrary construction contended for, it is admitted, that if the grandson should survive the widow he would be entitled to the whole; but the son and grandson are supposed to have taken a vested interest in a moiety of the L.5000, liable to be divested only on the double contingency of one of them dying in the lifetime of the widow, and the other surviving her. I cannot think that the testator had any notion that the personal representatives of the predeceasing son or grandson could have any interest in the fund. It is allowed that the whole was to go to the son or grandson if he survived the widow, and it would seem strange that the representatives of the predeceasing son or grandson, who could make no claim if the survivor of the two should survive the widow, should be entitled to a moiety if both died in the widow's lifetime. In the absence of any words expressly to denote such an intention, I think, irrespective of the authorities, that in the event that has happened the same effect is to be given to this clause as if the grandson alone had been named as legatee after the death of the widow."—(*White v. Baker*, 8 W. R. 533.)

**TRUST—Liability of Retired Trustees.**—Trustees of a settlement commit a breach of trust by advancing part of the trust fund to the tenant for life upon various securities, some of which are realised. The tenant for life urges the appointment of new trustees, on the ground that he has been treated unjustly by retention of income to recoup the trust fund and the realisation of the securities; and the trustees express their willingness to resign if others can be found who would put him to less inconvenience. Certain persons being proposed, the old trustees insist upon knowing who they are, and make objections, but eventually transfer the residue of the trust fund and the other securities to the new trustees, one of whom advances sufficient to reinstate the trust fund; but not only that sum, but the whole of the trust fund, is sold out within a few days, and appropriated by the tenant for life. Upon a bill filed by the children of the marriage against the tenant for life, and the new and old trustees, it is deposed that the old trustees had been solemnly cautioned that the tenant for life had concocted a scheme with the intended new trustees, and the tenant for life swears that he communicated as much to them. By their answer the old trustees deny the caution, but do not contradict the affidavit of the tenant for life, although at the bar they state that they would have done so, but were ignorant of its existence. Subsequently to this bill the plaintiffs purchase the real estate settled and the life interest of the tenant for life; and a cross bill is filed by the old trustees, on the ground that this was a condonation. *Held*—That the original trustees, not having answered the affidavit of the tenant for life, were responsible for the whole trust fund; that there was no condonation; and decree given against trustees, with costs. *Kindersley, V. C.*—"If trustees, knowing, or having good reason to believe or suspect, that the object of being applied to to give up the trust was to enable the new trustees to commit a breach of trust, no doubt such old trustees made themselves responsible to the *cestui que trusts*; and the question really was, whether this was that case. On the face of the letters there was no ground for making them liable. One thing, however, was clear, that the trustees were solemnly and seriously cautioned, especially by the letter of Garnier and Rowlestone. But there was another ingredient in the case, which it was impossible to get over. Webster had made an affidavit, stating that he had himself communicated to the trustees the fact that it was intended between him and the new trustees, that they should assist him by sales of the stock; and that Le Hunt had told him repeatedly that he would not ad-

vance him any more money, but would willingly resign if he (Webster) could find trustees to assist him out of the trust fund, and that Le Hunt and Wakefield perfectly well knew that his object in getting new trustees appointed was to get sums of money out of the trust fund. This was inconsistent with the correspondence, but not such a contradiction as to make it incredible. If Webster's evidence had been otherwise contradicted as to any material fact, this affidavit might be looked at with suspicion; but, for some unexplained reason, no attempt was made to contradict it, and therefore it must be taken to be admitted to be true. It was said to be an oversight, and that the defendants never saw it, and that it could have been contradicted; why it was not, when being filed in July 1855—the time for closing evidence did not arrive till 1858—was unaccountable. Had Webster been alive, he could have been cross-examined; but being dead, the other living witnesses could not now be examined to contradict a dead man's testimony, although the Court was very desirous to set it right."—(*Webster v. Le Hunt*, 8 W. R. 534.)

**DEED—Essential Error.**—Real estate was settled on A. for life; remainder to B., his eldest son, in tail. B., at A.'s request, joined with him in opening the entail to let in a charge. The estates were resettled, and several years afterwards B. discovered that his estate tail had been cut down to an estate for life. B. stated that he had joined in opening the entail on the understanding that, subject to the charge and to certain modifications in A.'s power of jointuring and charging portions, the estates should be settled precisely as they had previously been. A. stated that he had been under the same impression. On evidence that the persons who prepared the resettlement had explained the limitations to A. and B., a bill filed by B. to rectify the settlement was dismissed with costs. *Stuart, V. C.*—"In questions of this kind, where deeds have been deliberately executed by one who afterwards seeks to set them aside on the ground of surprise or mistake, what the Court must look to is, whether there is evidence that there was sufficient knowledge of the nature, contents, and effect of the instrument conveyed to the mind of the person who seeks to be relieved. For the purpose of communicating this knowledge, it is generally enough to show that the instrument itself was read so as to be understood. The absurd and highly improper verbosity and prolixity of many modern deeds and wills makes the mere reading or hearing them read, so as perfectly to understand the effect, a task not only irksome, but very difficult even to men who have much acuteness and facility of apprehension. In any case, therefore, but particularly in the case of a young man who, soon after he comes of age, is about to execute deeds materially affecting his rights, it is the duty of professional men to be careful that everything of importance is fully explained, and a proper opportunity given to understand the nature and effect of the instrument. It is proved by the evidence in this case, that, both by word of mouth and by reading the contents of a short and clear epitome of the instrument, the plaintiff had brought to his mind a knowledge of the fact, that under the resettlement he was to take only an estate for life."—(*Jenner v. Jenner*, 8 W. R. 587.)

**GUARANTEE—Condition precedent.**—The plaintiff declared that, in consideration that he, the plaintiff, guaranteed the defendant that two bills of exchange, both drawn by Messrs C. W. Olivier & Co., upon Messrs Owen & Co., 75, Lower Thames Street, and both due 23d of January 1859, would be paid and retired by the said Messrs Owen & Co. when due. The defendant, in return, engaged and guaranteed to the plaintiff the repayment of the sum of L.300 towards the payment of Scotch whiskies, as follows:—6 puncheons, 5 hogheads, 4 quarter casks, Auchtertool; 2 puncheons, 5 hogheads, 8 quarter casks, Anderton, which Mr B. Fisse, of Norris Street, had ordered, and was about to receive from the plaintiff. Averment, that the plaintiff had performed all things on his part to be done and performed in pursuance of the said agreement, to entitle him to the due performance by the defendant of his (the defendant's) part of the said agreement; and that the said two bills of exchange of L.100 and L.62 were duly

paid and retired by the said Messrs Owen & Co. when the same became due and were payable; and that the plaintiff delivered to the said Mr B. Fisse the said Scotch whiskies in the said agreement hereinbefore (in the declaration) mentioned; and that the said Mr B. Fisse, although requested to pay the said amount of L.300 towards the payment of the said Scotch whiskies, has not paid, etc. Second plea for defendant—That, although the said debt and sum of L.300 in the said first count, etc., the repayment whereof the defendant engaged and guaranteed to the plaintiff, was not payable until after the said two bills drawn by Messrs C. W. Olivier, upon Messrs Owen & Co., and guaranteed by the plaintiff, became due and payable, as the plaintiff and defendant at the time of the making of the said mutual agreement and guarantees well knew, yet the said two bills of exchange of L.100 and L.62, in the said first count, etc., were not duly or any time paid or retired by the said Messrs Owen & Co., of which the plaintiff had due notice, but never at any time paid or retired the said bills. Verdict having been returned for defendant on that plea, judgment was moved for by the plaintiff *non obstante veredicto*. Erle, C. J.—“The real question is, whether the promises are independent or mutual. It appears to me that they are independent promises. The plaintiff guarantees that Owen's bills shall be paid and retired by Owen, at maturity. The defendant guarantees the payment of L.300 towards defraying the costs of the whiskies. The breach on the one part would differ in damages from that on the other. It would appear, therefore, that they should not be, the one a condition precedent for the other. It is entirely, to my mind, a question of what I may call a fact; that is, the interpretation of the contract is a question of what was the intention of the parties. We have come to the conclusion that these are independent promises, that the plea furnishes no answer, and consequently that this rule should be made absolute, and judgment *non obstante veredicto* be entered for the plaintiff on the second issue.”—(*Christie v. Bonelly*, 8 W. R. 542.)

**EVIDENCE—Privileged Communication.**—This was an action for slander, tried before Bramwell, B., last January. The alleged slander consisted in a statement, made in February 1856, by the defendant to Colonel Shirley, as to the plaintiff's military conduct. A verdict having been found for the defendant, Edwin James, Q.C., obtained a rule *nisi* for a new trial, on the grounds, that the communication which contained the alleged slander was not privileged; that the judge did not make Mr Sidney Herbert, the Secretary for War, one of the witnesses at the trial, produce certain documents which he had with him, on his saying it would be against public policy to do so; and that the verdict was against the evidence. After hearing counsel, the rule was discharged. Pollock, C. B.—“We are all of opinion that the non-production of these documents furnished no ground for a new trial. Indeed, had the documents been produced and received in evidence, and the verdict had been for the plaintiff instead of (as it was) for the defendant, the reception of the evidence (if objected to) would have been a ground for a new trial; but inasmuch as my brother Bramwell did not at the trial take this view of the case, but declined to compel the production of the evidence on the ground that the Secretary for War stated that the production of the documents would be injurious to the public service, we think it due to my brother Bramwell to express the entire concurrence of a majority of the Court in that ruling of his. We are all of opinion that it cannot be laid down that all public documents, including treaties with foreign powers, and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest, we think, that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of State. We are of opinion, that if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of justice; and the question then

arises, how is this to be determined? It is manifest it must be determined either by the presiding judge or by the responsible servant of the Crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private, and which, taking place in public, may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question whether the production of the document would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper. If the head of the department does not attend personally to say that the production of the document will be injurious, but sends it to be produced or not, as the judge may think proper, or, as was the case in *Dickson v. Earl of Wilton*, before Lord Campbell, and reported in *Foster and Finlason's 'Nisi Prius Reports,'* page 425, when a subordinate was sent with the document, with instructions to object, but nothing more, the case may be different. My brother Martin does not entirely agree with us as to this view of the point in question. He is of opinion, that whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel its production, notwithstanding the reluctance of the head of the department to produce it; and perhaps cases might arise where the matter would be so clear that the judge might well ask for it in spite of some official scruples as to producing it."—(*Beatson v. Skene*, 8 W. R. 544.)

**RAILWAY COMPANY—Negligence.**—Some combustible grass adjoining a railway was set fire to by a locomotive engine which was passing, and caused the destruction of the plaintiff's wood. The railway company, to whom the engine belonged, had adopted every practicable means to avoid the danger. Verdict having been returned for the plaintiff, the defendants obtained a rule to show cause why this verdict should not be set aside, and a new trial had, on the ground that it was against evidence, and that there was a misdirection in telling the jury that no amount of care or skill used in preventing the escape of coals from the engine would be an answer to the charge of negligence, provided the accident was not thereby prevented, and that the conduct of the plaintiff, in allowing his wood to be in a combustible state, was not material. Held by the Ex. C., reversing judgment of the Court of Ex., that the company were not liable. Cockburn, C.J.—I am of opinion that the decision in the Court below cannot be upheld; the case, therefore, must go down again for a new trial. I collect from the reasoning in the judgment delivered by Bramwell, B., in the Court below, that the view of the case there taken by the Court is this:—That whereas accidents occasionally arise from the use of fire as the means of locomotion, they are to be held as a necessary and natural incident to such use of fire, and therefore that the company, in this case, are liable in respect of accident from the use of the locomotive, although every possible known precaution has been taken; and that they are responsible for accident in so far as it is necessarily contingent on the use of the locomotive. If this be the view of the case held by the Court of Exchequer, it is one which we cannot uphold, as being at variance with the principle established in *Reg. v. Pease*, and which this Court maintains and adopts. Although where a person keeps a dangerous animal or instrument, or other means whereby danger arises, he is, independently of any actual negligence on his part, liable for the damage done; yet when the Legislature has sanctioned and legitimized the use of a certain instrument, provided every precaution has been taken and observed with due and reasonable diligence, it must be held that the person using such instrument is not liable, unless there is actual negligence in the use of it. This is the principle which governs the case of *Reg. v. Pease* (4 B. & Ad. 80), and I think it consonant with reason and justice.—(*Vaughan v. The Taff Vale Railway Co.*, 8 W. R. 549.)

**DIVORCE—Wife's Costs.**—In a petition by the wife for judicial separation by reason of the husband's adultery, the case was tried by the Judge Ordinary

without a jury; and the learned judge was of opinion that the evidence failed to establish the adultery, and dismissed the petition. The sum of L.90 had been paid into Court by order of the Registrar, before the hearing, to meet the wife's costs. After the trial, the wife's costs were taxed by order of the Court, and were found to amount to L.182, 10s. The plaintiff having moved for an order on the respondent to pay the balance of L.42, 10s., the Judge Ordinary—According to the old practice, on failure of the wife's suit, the Court would have made no order, if the costs had not been paid before trial: here it is impossible to tell accurately before the trial what the costs will properly amount to; as the nearest substitute, the rule is established, that the Registrar should make the best calculation he can from the representations made to him by the parties; so that the wife's professional adviser, up to that amount, may be secured. As to anything beyond that, the wife must be in the position of a failing suitor.—(*Lopwith v. Lopwith*, 8 W. R. 552.)

**EVIDENCE—Bigamy.**—In a petition for dissolution of marriage by reason of adultery, bigamy, and desertion, *held* by the full Court, that to establish bigamy as a ground for the sentence of the Court, there must be proof of such a ceremony as, but for a former marriage, would constitute a valid marriage; and, therefore, when the bigamy relied upon took place abroad, it will be necessary to give formal proof of the marriage law of that country.—(*Burt v. Burt*, 8 W. R. 552.)

**JOINT-STOCK COMPANY—Proceedings ultra vires.**—A company was formed for the purpose, as stated in the memorandum of association, of the purchase of land for the erection of an hotel, the carrying on the usual business of an hotel and tavern there, and the doing all such things as were incidental or otherwise conducive to the attainment of the above objects. The land was obtained, and a spacious building nearly completed, when the directors entered into an agreement for leasing nearly half of the building to a Government Board, for three or five years, at L.6000 a-year, the right of supplying provisions, etc., to the Board during their tenancy being reserved by the company. It appeared that the sum of L.2000 would be required for alterations, and for afterwards restoring the demised portion to hotel purposes. At an extraordinary general meeting of the shareholders, the majority sanctioned the proposed arrangement of the directors. The plaintiff, a shareholder who dissented from this proposal, filed a bill to restrain the company from granting the lease, and expending the company's funds as proposed. *Held, per Knight Bruce, L. J.*, affirming Wood, V.C., that, as the business had not commenced, it was not *ultra vires* for the directors and the majority of the shareholders, acting *bonâ fide*, to commence the business of the hotel with a portion only of the building, and to let the remainder for the purpose and for the term proposed; and that the injunction must be refused. *Turner, L.J., dissentiente*.—The case presents, as it seems to me, three points for our consideration. First—Is the letting of a large portion of an hotel to a public Board for a lengthened period a carrying on the hotel, or the usual business of an hotel and tavern? Second—Is such a letting incidental or conducive to the attainment of the objects mentioned in the third clause of the memorandum? And, thirdly,—Does the constitution of the company leave it in the power of the directors, or of the shareholders, in the existing state of things, to authorize at their discretion the carrying into effect the proposed arrangement? Upon the first two of these I have felt no difficulty. I do not think that the letting of a larger portion of these buildings to a Government Board, for so long a period, could be said to be carrying on in the building the usual business of an hotel and tavern. As to the proposed arrangement being "incidental or otherwise conducive" to the objects mentioned in the memorandum, I do not think that it can be held to be so. The words, "incidental or conducive to the attainment of the objects," so far as they apply to the business, do not seem to me to extend so far as to warrant a scheme for obtaining the object of carrying on the business in the entire building by devoting part of the building



to a purpose which, I have already said, does not seem to me to fall within the purposes which were contemplated by the memorandum; coupled as the words, "incidental or conducive," are together, they seem to me, so far as they apply to the business, to refer to what may be incidental or conducive to the prosecution of the business in the entire hotel. The only difficulty which I have felt in the case has been upon the third question. I am not prepared to say, in cases of large buildings coming to completion as to part at one time and part at another, that it may not be, in the absence of any provisions to the contrary in the instrument by which the company is formed, in the power of the directors or the shareholders, before the whole undertaking had been completed, to employ the parts which have been completed to purposes useful and profitable to the company. And, perhaps, they may be entitled to do so, even though the purposes to which the completed parts are applied be not purposes within the scope of their undertaking, though I have much doubt upon the point, and I do not intend to give any opinion upon it. My difficulty has turned upon the question whether such considerations as those may not apply to the case; and if they do apply, what effect ought to be given to them? In this result, however, I come to the conclusion, that, in assuming it to be competent to the directors or shareholders to deal with the property *ad interim* before the whole hotel can be opened at their discretion, it is not, and it cannot be competent to them to deal with it in such a manner as may interfere with the ultimate purposes of the company, the opening of the entire hotel. The Court being equally divided, the judgment of V. C. Wood was affirmed, but without costs.—(*Simpson v. Westminster Palace Hotel Co.*, 8 W. R. 553.)

**WILL—Vested Interest.**—A testator, after directing payment of his debts, and confirming his marriage settlement, under which his wife had a life interest, makes a specific bequest to her, and then bequeaths to her and two other persons all his money and securities due at his death, upon trust to convert, and pay certain legacies, and all the residue of the said monies, between all his nephews and nieces who should be then living, share and share alike, naming them, with some exceptions. And in case of the death of any of them before receiving their shares, such share to be paid to the survivor. By a codicil the testator gives to his wife all his realty and personalty for life, declaring that the codicil should be annexed to, and form part of his will. A niece died within a year after the testator, and several nephews and nieces had died since. Upon the question, what interest the nephews and nieces took under the will—*held*, that the widow took no life interest in the fund given to the nephews and nieces; and that they took vested interests at the death of the testator, in their shares payable one year after the testator's death; and, consequently, the niece who died before that period had no benefit out of the bequest.—(*Re Arron-smith's Trust*, 8 W. R. 555.)

**RAILWAY—Disability of Co. to deal in Minerals, etc.** (17 & 18 Vict., c. 31).—A railway company nominate an agent, and find him offices at their stations for the sale of coal, and in many instances procure him to be appointed by the coal-owners; but where such coal-owners do not concur in appointing him, debit themselves in their books with the agent's commission, and make out receipts to be signed by the coal-owners in a printed form, whereby it appears that the money received is the balance of the price at the pit's mouth. They also treat the sum received by them for coals sold, as their charges for carrying, tonnage, terminal dues, etc., and keep no account with coal-owners, who are paid irrespective of whether the coals are kept in stock or not. Upon information filed to restrain such company from buying and selling coal, raising the question whether they are dealers in coal,—*held*, that they are such dealers. Where a special Act enables a company to make and maintain a railway, and is silent as to any restriction upon exercising any other calling, the absolute restriction upon doing so is implied, and the carrying on of any business other than that warranted by the Act is *ultra vires*, and may be restrained by injunction.

**Kindersley, V.C.**—An Act constituting a railway was a contract with the public, although through the medium of the machinery of an Act of Parliament, and the company were bound by it; and, although the Act contained no express prohibition against carrying on any other business, there was an implied contract to that effect, and that was a clear rule of law in the absence of negative provisions. The motive, no doubt, as was ably argued by Mr Stevens, was immaterial; the case of steamers from Harwich to the Continent was in point. What was the effect, then, on the rights and interests of the public? Why had the law established a prohibition against other dealings? Because joint-stock, and particularly railway companies, were armed with powers of possessing vast amounts of money and property, which, if applied to other purposes, might injure the interests of the public, and it was hardly possible to illustrate that better than by this case. This company had a traffic to the north of England, bought coal, and might get all the traffic in a large district into their own hands—and they had in fact done so—and might do the same with all agricultural produce, such as corn, sheep, and beasts, and supply the London markets; and if that was permitted, where was it to stop? This would be a great detriment. It was said that coal would be cheaper; but what faith could be placed in the morality of joint-stock companies, who would only consider their own interests, and how they could make money? The only remaining question was—Was the information a competent and legitimate remedy? Upon this, likewise, his Honour had no doubt. Wherever the interests of the public were damnified by the illegal proceedings of a company, it was in the discretion of the Attorney-General to protect the public by information or injunction. The question of nuisance was only a branch of this right, and something done by a company or a person which was illegal and detrimental to the public. Nuisance, no doubt, had a technical meaning, but the public must be equally protected; and in the absence of any particular Act of Parliament, it was competent to the Attorney-General to proceed either *ex officio*, or at the relation of some party, which he might do out of consideration that such relator would be able to answer costs.—(*Attorney-General v. Great Northern Railway Co.*, 8 W. R. 557.)

**DESIGNATION—Policy of Assurance.**—By a form of proposal for insurance the name, residence, profession, or occupation of the person whose life was proposed to be insured against death by accident only, with compensation in case of non-fatal accident, were required to be stated. The policy contained a proviso, that if any statement or allegation in the declaration or proposal were untrue, or if the policy had been obtained, or should thereafter be continued, through any misrepresentation, concealment, or untrue averment whatsoever, etc., the policy should be void. The plaintiff was an ironmonger, and in the proposal he described himself as “Isaac Thomas Perrins, Esquire, Saltley Hall,” omitting to state that he was an ironmonger. The same rate of premium would have been required of him if he had stated his occupation of ironmonger in addition to the word esquire. *Held* unanimously (affirming the decision of the majority of the Court of Queen’s Bench), that the policy was not void by reason of the plaintiff not stating his occupation. Williams, J.—I am of opinion that the decision of the Court below was right. It is said that a false assertion has been made by the assured, because he has suppressed the truth; but there is no foundation for saying that the truth has been suppressed. What I understand the assured to have said in giving the particulars required of him is, that he was in that condition of life where people are called esquires. “Isaac Thomas Perrins, Esquire, Saltley Hall, Warwick” does not mean that the assured is not a tradesman, any more than a description of a peer described as such would imply that he was not a banker or a brewer. Martin, B., thought the defence was disgraceful.—(*Perrins v. The Marine and General Travellers Ass. Co.*, 8 W. R. 563.)

**LOCUS PENITENTIE.—Payment by Half Notes.**—S. agreed to enter into partnership with W., and to pay W.’s debts, and with that view sent to M., a creditor of W.’s, two half bank notes. The agreement between S. and W. was

then broken off. *Held*, in an action of trover by S. for the half notes, that they were not payment, and that S. was entitled to recover them back. Cockburn, C. J.—The case is a novel one; but when it is carefully looked at, the difficulty disappears. What was the intention of the parties? The intention of the plaintiff was to liquidate the debt of Williams. This parting with the property in the notes was co-extensive with that purpose. Does he, by sending the half notes, extinguish Williams' liability to the defendant? He does not, for there is nothing to prevent the defendant from suing Williams for the debt. Suppose the other half notes had been lost in the transit, could not the defendant have repudiated, accepting the half notes he had received as payment? There is nothing to prevent him from treating it as an inchoate acceptance to be completed on the arrival of the other half notes. Blackburn, J., said, that the case is much the same as if each party took hold of one end of the notes, and before the plaintiff let go of the entire, and the defendant got possession of the whole, news had arrived which led the plaintiff to revoke his intention to part with the property.—(*Smith v. Munday*, 2 L. T. Rep. 373.)

**WILL—Construction.**—A testator, by his will, gave certain property to his son and daughter, and directed that if his son should die without having any child or children, the whole of the property left to him should go to his (the testator's) daughter and niece equally. And he provided that if his son and daughter should die without any child or children, then the whole property should go to his (the testator's) niece. *Held*, on the principle of giving to each clause its own effect, that the words in the first clause, "die without having any child or children," meant "die without having had any child or children;" so that the testator's son, having had several children who were dead, the gift over to the niece did not take effect; and that the words in the second clause, "die without any child or children," meant "die without leaving any child or children living at the death;" so that the gift over to the niece would take effect if the testator's son should die without leaving a child living at his death.—(*Jeffreys v. Connor*, 8 W. R. 573.)

**WILL—Construction.**—A testator, while returning to England on sick leave, made his will, by which, after bequeathing two legacies of L.10 each, and directing that his portmanteau, etc., should be sent to his father, proceeded thus:—"I beg that the remainder of my money and effects be expended in purchasing a suitable present for my god-son H. F. D." At the testator's death, which took place the day after the date of his will, he was entitled to reversionary interests in two considerable sums of stock. *Held*, by Stuart, V. C., that the stock to which he was so entitled did not pass under his will to his god-son.—(*Berton v. Dunbar*, 8 W. R. 577.)

**REPARATION—Consequential Damage.**—B., acting as agent for C., induced D. to purchase of C. the goodwill of a public-house on a misrepresentation as to the daily "takings." D. sued C. for the deceit without communicating with B., but failed in his action because he could not show that he had authorized B. or any one else to make such misrepresentations. D. then sued B. and obtained a verdict, including the sum he had lost by the resale of the goodwill, a sum for personal loss and inconvenience, and L.181, the costs of the action against C., who failed. It was *held* now, that he was not entitled to recover the costs of the action against C., this damage not being the necessary and proximate result of B.'s act.—(*Richardson v. Dunn*, 2 L. T. Rep. N. S. 430.)

**PRINCIPAL AND AGENT—Commission.**—B., a commission agent, proposed to do business with C., a manufacturer, on these terms, as stated in a letter: "We expect to receive our commission on all goods bought by houses whose accounts are open through us." B. introduced a customer to C., who received from him an order, which he accepted, but did not execute. B. claimed commission, which C. refused to pay, and the question was, what was the meaning of the term, "goods bought;" did it apply to orders given and accepted, or to

goods sold and paid for? The Court held that it applied to the former, and that B. was consequently entitled to his commission on the order, though it was not executed.—(*Lockwood v. Levick*, 2 L. T. Rep. N. S. 357.)

**PRINCIPAL AND AGENT—Charter-party.**—In a charter-party it was agreed "between D. and Son, owners of the ship A., of the one part, and G. Brothers, as agents to F., of Anamaboo, merchants and charterers, of the other part, etc." The voyage, etc., was then set out; the words merchants and charterers in the plural number were printed and continued in the plural throughout the whole charter-party. It was signed "For D. and Son of Jersey, owners: B. as agent. For F., of Anamaboo; G. Brothers, as agents." *Held*, by the Ex. C., affirming the judgment of the Court of Q. B., that G. Brothers were not liable on the charter-party as principals. Williams, J.—We are all of opinion that the judgment given in the Court below is right. The signature of the charter-party is "For G. Deslandes, H. Gamman as agent. For S. Ferguson, Esq., Gregory Brothers as agents." And the force of this signature can only be explained away by extremely strong words. Here the body of the document is not contradictory. It is in the usual terms, the plural being only used instead of the singular in the words "merchants and charterers," for "merchant and charterer."—(*Deslandes v. Gregory*, 8 W. R. 585.)

**PRIVILEGE OF PROCURATOR—Slander.**—An action of slander cannot be brought for anything said in the regular course of a judicial proceeding; therefore, where an attorney, in a speech for the defence in a police court, said that the prosecutor had plundered his master, and the prosecutor gained the verdict in an action for slander against the attorney,—*Held*, that the matter alleged to be slanderous being relevant was privileged, and that a nonsuit should be entered. Pollock, C. B. (after narrating the facts)—In the course of that proceeding, in order to show that the plaintiff was properly dismissed, the now defendant said that the plaintiff plundered his employer. The question is, was that relevant to the question before the magistrates? I think it was; for it went directly to the question, Was the agreement at an end, so as to justify the then defendants turning the plaintiff out of those premises? This action is against the defendant for words spoken by him in a court of justice where he was acting as counsel. The judge at the trial having reserved the point, we think there should be a nonsuit.—(*Mackay v. Ford*, 8 W. R. 587.)

**WILL—Position of Signature.**—Testator left a will which concluded in the following terms:—"All of which to be paid with the then present coin of the realm, upon application to my dear wife, Sarah Skidmore; and a receipt to be provided by the receiver from all further claim upon the estate of their departed brother, Joseph Skidmore." Immediately below this appeared—

"Witness, JAMES SKIDMORE.

"Witness, HENRY EEDE.

"April 11, 1838."

The words, "Witness, James Skidmore," had been written apparently in much paler ink than the words, "Witness, Henry Eede," and the date was in the same handwriting as the latter words. The Court admitted the will to probate, as proof of the death of the witnesses. Sir C. Cresswell—It was argued in this case that this will was not executed according to 1 Vict., c. 26. For it appeared from the colour of the ink in the signature of one of the witnesses that the two witnesses had not signed their names at the same time; and that, therefore, they had not signed in the presence of the testator as required by the statute. The different colour of the ink in which the names of the witnesses are written might have been caused by blotting paper being at the time used to one and not to the other. At all events, it is too frail a ground to proceed upon in considering the question of the validity of this will, and I cannot come to a safe conclusion upon such a suggestion; and the absence of any proof to the contrary, the signatures of the witnesses being shown to be genuine, the usual presumption *omnia rite*

*esse acta* must prevail, and I must assume that they both signed at the same time. With reference to the name of the testator, "Joseph Skidmore," at the end of the will, as taken in connection with the construction of the sentence immediately preceding it, I consider that he must have intended that to be his signature to the will, although it may read in another manner. If those names had been separated from the word "brother" by only half an inch, instead of being so near, there could not have been any doubt about the matter; and I consider that the fact of a space not having been left is too slight a ground upon which to pronounce against the will. I am, therefore, under all the circumstances, clearly of opinion that the will of the testator has been duly executed.—(*Scott v. Skidmore*, 8 W. R. 590.)

**POOR-RATE—Waterworks—Rateable Value.**—A waterworks company, in order to convey water from their reservoirs to their district in the metropolis, forced it through pipes laid down for that purpose. The reservoirs and pipes formed together one apparatus, situate in several parishes, in none of which water was sold by the company. It was agreed that the rateable value of the whole apparatus should be fixed at a certain sum. *Held*, that it was not a correct principle of division that this sum should be divided among the several parishes according to the quantity of land occupied by the apparatus in each parish.—(*Chelsea Waterworks Company v. Overseers of Putney*, 8 W. R. 607.)

**PARTNERSHIP.**—It was held in *Essell v. Hayward*, that where one partner commits a breach of trust, the other has a right to dissolve the partnership, the dissolution to take effect from the date of the notice. The M. R.—It appears that a partnership was entered into by two gentlemen for the period of their lives; and it appears that in October last one of the partners ascertained that the other, being the surviving trustee of L.8000 in the funds, sold it out and applied it to his own use. That is as gross a breach of trust as could well be committed. He ascertained the fact by a letter from one of the *cestui que trust*, and thereupon he writes a letter in which he says the information he has received, so far as relates to the question of money, might be got over; but, so far as it affects the defendant's position, the credit of the plaintiff, and the maintenance of the character of the firm, could not be got over; and, therefore, the partnership must be dissolved; and he gives him notice immediately of a dissolution. The question is, whether he was justified in doing that? In the first place, Mr Selwyn argues that the plaintiff seeks to make himself judge in his own case. This is not so. The Court is the judge whether the facts justified his conduct. Then the only question really is this—Was there a sufficient ground for saying the partnership was dissolved? I am to determine here whether, on the 6th of October, the fact of this embezzlement of the stock had taken place; and whether, having taken place, it was a sufficient cause for the plaintiff to put an end to the partnership. . . . Considering that the principles of equity are, in my opinion, so clear and precise on the point, I am indifferent whether any distinct authority is to be found in the books on the subject, and I shall continue to hold the opinion which I have expressed until I am corrected by the decision of some higher tribunal, which, when it takes place, if ever it does, I shall receive with much surprise.—(8 W. R. 593.)

**WILL—Jus coronæ.**—A testator who is illegitimate, and dies without issue, gives all his personalty to three persons, their executors and administrators, upon trust, to lay out L.1000 in building and endowing a church, with certain devices of his real estate, and appoints them executors. Two of the executors disclaim, and the third files a bill, raising the question whether the charitable gift was void; and if so, whether the plaintiff took the personalty for his own benefit. *Held*, that he did not, but that the Crown was entitled.—(*Dacre v. Parkinson*, 8 W. R. 597.)

THE

# JOURNAL OF JURISPRUDENCE.

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## LORD DERBY ON THE BUSINESS OF LEGISLATION.

It cannot be denied that the working of our legislative system is encumbered with difficulties. If it is essential that we should have a legislative machine capable of turning out the greatest quantity of work in the shortest possible time, the Imperial Parliament must be admitted to be wanting in the requisites of celerity and power. There is, however, a wide difference between the principles that may be applied to test the capabilities of the machinery employed in the administration of the laws, and those that regulate the initiation of new projects of legislation. Law-making may proceed too fast; and though we do not know that any of our constitutional theorists are prepared to follow the example of the Hellenic lawgiver, by requiring the amateur legislator to stand up with a halter adjusted to his neck, yet it is certain that complaints of hasty and unnecessary legislation are rife; and it is at any rate an open question, whether legislation is too facile or too slow.

Legislation, when initiated by private members, does not seem to be attended with any insurmountable difficulty, where the provisions contemplated are of a limited character and the object is one generally admitted to be beneficial. Among instances of successful private legislation, it is only necessary to mention the Medical Bill of 1858. Among projects of law amendment, such measures as Mr Apsley Pellat's Bill for legalizing Crossed Cheques, and Mr Murray Dunlop's Scotch Bills, have, as a rule, been carried through Parliament in a single session, and without experiencing much obstruction or danger from the forms of the Houses of Parliament. It is perhaps to be regretted that so few private members care to be at

the trouble of carrying bills through Parliament ; but any member who is so disposed, has only to come prepared with a well-digested measure, and get it introduced and printed in the first week of the session. If it fail to pass, we venture to say, that it will not be for want of time to carry the bill through its stages.

Unfortunately, it too often happens that the first month or two of the Parliamentary session is wasted in frivolous discussions. About Easter honourable members wake up to the necessity of doing something. In the early part of the summer, the great annual battle on the financial policy of the Government has to be fought through many a weary sitting ; and the orders of private members are ruthlessly sacrificed to make way for questions of more general importance. July arrives, and with it the certainty that a large proportion of the public bills will be lost for want of time to pass them through the narrow gauge lately constructed by the House of Lords. Then ensues a scene which can only be compared to the rush from a theatre on an alarm of fire. The Government abandon their most doubtful measures, and save the remainder ; but with private members it is otherwise. Every would-be legislator elbows his neighbour—tumbles him over without remorse, in the mad struggle to pull through with his “ innocent ” before the fatal 18th of July. When the work of legislation has advanced to that period after which the doors of the upper House are closed against new bills, there will probably be from twenty to thirty bills waiting a third reading, half of which might have been advanced, if their promoters had been able to agree upon a selection. For want of some such arrangement, scarce any are saved. Ultimately the Government business is hurried through, and Parliament adjourns to do over again, in a new session of six months, what might have been brought to completion in almost as many days of the previous year. To economize the time of the Houses, Lord Derby has proposed that prorogation should have the same effect as adjournment, so that bills uncompleted might be resumed in the following session at the precise stage at which they were left off. Lord Derby deserves credit for having brought this subject under the notice of Parliament ; and we trust that his proposal for a joint committee on the subject will not be allowed to drop, but we are certainly not prepared to concur in his recommendations in their entirety.

It is not the fact that the forms of Parliament are frequently abused for the purpose of obstructing public ministerial measures ;

and it is well known, that when anything of the kind has been attempted, the attempt has invariably failed. The opposition to the Ecclesiastical Titles Bill is, perhaps, the most remarkable instance of what may be accomplished by a courageous minority inspired by party feeling, and supported by almost the entire intellectual strength of the House of Commons. Yet, even in this struggle, the weight of mere numbers proved irresistible. The arguments of the minority convinced the country, but did not materially retard the progress of the measure. The Bill became law after repeated divisions at every stage, but common sense had decreed its repeal before it was inscribed on the Statute Book. In the last session of Parliament there was some talk of factious opposition to two of the Government measures—the Reform Bill, and the European Forces (India) Bill. There has seldom been less real foundation for such a charge. In the one case, the attention of members was suddenly called to the nature of a measure which had passed the second reading in a thin House; and repeated adjournments were moved, in order to give time for consideration. The merits of the Bill apart, there can be no doubt that this course was perfectly justifiable. A minority is entitled to a fair hearing at each stage of discussion, and also to reasonable delay, for the purpose of influencing the public mind, and bringing public opinion to bear on the policy of their coadjutors. Unless the minority were in a position to enforce these rights by moving adjournments, it would be in the power of any minister, with a tyrannical majority at his back, to nullify the functions of opposition altogether. As for the opposition to the Reform Bill, it was natural that a measure of that importance should be anxiously canvassed and criticised. And it cannot be denied that the measure fell a sacrifice to the indifference or secret hostility of its professed friends, as much as to the opposition of its natural enemies.

Reverting now to measures of less general importance—it will be admitted that a large proportion of those which fail are mere fancy bills of individual members, and have never attracted any share of public sympathy, either within or without the walls of St Stephens. Some of these bills are renewed from session to session, apparently for the mere pleasure of furnishing occupation to the owner; like those “bag” foxes which, if they afford a good day’s run, are carefully stowed away, in the hope that they may furnish amusement for another season. Good bills do, no doubt, occasionally fall a



sacrifice to the forms of the Houses; but, on the other hand, it ought not to be forgotten that these forms afford facilities for the extinguishing of local jobs. Measures of that description, if only supported by private influence, may generally be defeated in open warfare; but a little dexterity in the use of Parliamentary tactics will often ensure success, if supported by the influence of the Government, which is too easily lent to aid the measures of private members, in return for the party support they may have given on other questions. Now, let it be remembered that every Government has about *eighty* members of Parliament in its pay. These are the men who advance bills a stage between one and two in the morning, after most of the independent members have retired. As a general rule, all bills which will not bear open discussion are brought on at untimely hours; and the only possible means of defeating them is by employing the forms of the House for the purpose of postponing the discussion to a more suitable period. This sort of opposition is so common and so reasonable, that the promoter of the bill, as a matter of policy, generally gives way to it. But at length some lucky accident occurs. The policeman is absent from his beat. The member who has made himself master of the details of the bill with the view of opposing it, is in the country, or unwell, or busy with committee business. Other members who dislike the measure may be present, but they are dumb or deficient in influence, and so the job is advanced a stage. This may happen two or three times in the course of a session; yet still, if the promoters of the job have no case, they can rarely succeed, by dint of smuggling, in carrying the measure to a third reading. They know that a discussion in a full House would ruin their nicely laid scheme, and they naturally prefer to leave it over to wait the chapter of events in the ensuing session.

Now it is obvious, that if Lord Derby's proposition were accepted without limitation, the game would be thrown into the hands of the jobbers. If permitted to continue their bills from one session to another, success with these ingenious gentlemen would be merely a question of time. It would be of little avail to oppose them by moving adjournments; reasoning with them on the injustice of their designs on the public purse, would be of as much use as an argument on the law of property, addressed to a gentleman of the road, at twelve o'clock P.M.; or, like the famous attempt of the enthusiastic Dissenter, to *reason* a dignitary of the Church out of L.2000 a year.

Such bills would invariably be brought forward in a thin House, with a working majority on the Government benches. The report of such proceedings in the morning papers (if report these were), would be somewhat in the following strain :—

“ WEDNESDAY, MORNING SITTING.—Edinburgh Municipality Abolition Bill—Grand Masters of Orange Lodges’ Salaries Bill. These measures were advanced a stage. Sheriff Courts (Scotland) Finality Bill. On the order of the day being read for the committal of this Bill, which was read a second time on the 12th of August last year, Mr Baxter moved the adjournment of the debate, and explained that the object of the Bill was to make decrees of Sheriff’s substitutes final in all cases under the value of L.500, and to prohibit the employment of procurators. Sir G. Lewis explained that it was in contemplation to increase the salaries of the Sheriffs to L.2000. By increasing the responsibility of these judges, it was believed that the necessity for an appeal to the Court of Session might be obviated. He regretted the absence of his right hon. friend, the Lord Advocate, who intended to have explained to the House the nature of the changes which the Government were prepared to make in committee, but he could not concur in the disparaging observations in which the hon. member had indulged with reference to the decisions of the learned judges of the Sheriff Courts. The House divided. For adjournment, 3 ; against, 15 ; majority, 12. Mr Dunlop then moved the adjournment of the House. The Home Secretary said he would not persevere with the motion at present. . . . The Bill subsequently passed through committee at the evening sitting, on the understanding that it was not to be read a third time till next session !”

A very serious difficulty would also occur with reference to the disposal of bills appointed to be read “ this day six months.” By immemorial practice, it is impossible to defeat a bill after it has been once brought in, by moving a direct negative. The motion, as it stands on the orders of the day, is,—That the Bill be *now* read a second, or third time, or committed, as the case may be. The negative (That the Bill be not now read), if carried, merely places the motion in the position of a dropped order, and leaves it open to renewal at any convenient day in the same session. But if the Bill be set down for a reading on a day in vacation, the prorogation of Parliament in the interval extinguishes the Bill altogether. If, on the other hand, bills are allowed to be continued from one session to

another, how are they ever to be stopped? A bill may be so deteriorated in committee, that the House will refuse to read it a third time, and appoint the third reading to take place in three months. Under the system proposed by Lord Derby, it might be taken up as a dropped order, at the beginning of next session, and passed in a thin House, after a single reading, although previously condemned by a vote of the representatives of the people.

It is quite possible to provide against such disasters as befell the Bankruptcy Bill of the Attorney-General, without effecting any very sweeping changes in the constitutional usages of Parliament. The only class of bills for which provision requires to be made, are those voluminous bills (generally relating to the amendment of the law), which are admitted to be right in principle, but which, in consequence of the great complexity of their details, cannot be thoroughly discussed in one session of Parliament. It is a good maxim, applicable to all constitutional changes, that the remedy should not be carried further than is required by the nature of the disease; and it appears to us that the difficulty would be fully met by a standing order to the following effect. What we would propose is, that where a bill is read a second time in the House of Commons *without opposition*, it shall be lawful for that House, by a special resolution, to declare that the consideration of that bill may be deferred, if necessary, to the following session. If the House be unanimous in affirming the necessity of legislation on the subject, it seems unnecessary to renew the bill from year to year. But where the principle of the measure is considered objectionable, we see no reason for relaxing the ancient rule of Parliamentary procedure, which obliges the supporters of a contested bill to carry it through its several stages in the same session in which it has been introduced.

## DEFECTS IN THE LAW OF CITATION.

ALL legal proceedings are commenced by a summons or citation on the party complained of, to appear and answer for himself to the complaint or demand made upon him. It is essential to justice that there exist full assurance of this notice having been given, so that no man be condemned in his absence, at least without notice that his presence was required.

The Roman or civil law was very special on this matter. If a person had a dispute with any other, he first tried to have it arranged in private. In this he followed the Jewish law, as repeated by the Saviour in his sermon on the Mount. In our ordinary style of summons, there are still the words, *And the Defender having been often desired, fails to perform or pay.* In this, too, is the germ of modern courts of reconciliation. If the Romans could not make up their difference, then the claimant ordered his adversary to go with him to the tribunal of the judge. His summons was in these words, *In jus voco te, in jus eamus*, and similar epithets. If the defendant refused, the claimant took the bystanders to witness, and he then might pull the defendant into Court by force, even by the neck—*obtorse collo*. Hence the polite phraseology daily used in courts of law, of a party being *dragged into Court*. A man could not be thus forced from his dwelling-house, because such was *his sanctuary*, or, in our language, *his castle*. But if a person lurked at home to avoid the suit, he was summoned *thrice* by the voice of a herald, or by letters, or by edict of the prætor, and an interval of ten days intervened between each citation. If he was contumacious, the creditor was put in possession of his effects. When he appeared, if he found bail he was allowed to depart.

That eminent juriconsult, Lord Stair, thus discourses of the mode of bringing defenders into Court :—" Ordinary actions proceed not by brieves but by larger summonses, which are therefore called Libels. They are called summonses *à summonendo*, because the executions thereof advertise the defenders to appear and answer thereto at the terms therein prescribed. These executions are also called citations *à citando*, because they hasten the defender's appearance, which name arises from the ancient Roman way of citing parties, when the complainer, without authority from a judge, required his party to appear before a judge, who might hear and determine their controversy; and if he refused, he might compel



him if he had sufficient strength and assistance for that effect. But this course hath been long since laid aside, as being apt to beget breaches of the peace, and in place thereof, summonses by apparitors have succeeded, wherein there must be some certification, which may rather induce the person summoned to appear than to fall under these just penal consequences upon their contumacy. These penal consequences being declared by the tenor of the summons, are therefore called certifications, because the judge doth ascertain the party called, and not compearing, what he will do in that case. A certification is necessary in all summonses, for it is the sting that gives them efficacy, without which they would be elusory."—Stair, Pr. 4, T. 3, § 27.

The English and Scotch law differ on the effect of the non-appearance of a party defender. In the common law courts of England, the party being summoned, if he failed to appear, by the ancient law a writ was issued to attach his person or goods in order to enforce his attendance. By modern reforms, the attachment is superseded; but the plaintiff must, nevertheless, establish his case *ex parte* to the satisfaction of the Court or jury, before he obtains a verdict or decree in undefended cases.

In Scotland the non-appearance of the defender is held equivalent to confessing judgment in England, and decree is at once given, without any further inquiry or evidence, to the full extent of the demand. This decree, no doubt, may be opened up at any time before implement; but a poinding of the defender's effects has been held to be implement. This renders it more essential in Scotland to secure certainty of notice being given to the defender. But unfortunately there exists much laxity of practice in this respect with us. It is quite possible (and it is said that such cases have occurred), where both the summons and the charge on the decree not having come to the defender's knowledge, the poinding and sale of his effects were the first notices of the claim and decree, and thus no direct remedy or redress could be obtained.

The caution exercised in the County Court Acts of England stands strongly in contrast with our lax practice, especially in our Small Debt Courts.

In the first place, in England the service is made by the bailiff of the Court without any interference of the plaintiff. With us, Sheriff-officers as a class are not of the highest grade, and act often as agents for recovery of small debts, and as house-factors; and thus

they can and do act in concert with the prosecutors in Small Debt Courts.

The service in England must be either personal, or by delivering the writ to some person apparently of sixteen years of age at least, at the house, or place of dwelling, or place of business of the defendant.—(Rules of Practice, 43.) The only exception to this mode is where the defendant keeps his house closed *in order to prevent the bailiff from serving the summons*. Service may then be effected by affixing the summons on the door.—(Rule 50.)

Where the summons has not been served personally, and the defendant does not appear, it must be proved on oath, to the satisfaction of the judge, that the service *has come to the knowledge of the defendant before the return day*; but service by affixing is excepted from this rule.—(Rule 52.) The judge, on due proof of service, may, in the absence of the defendant, proceed with the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon is declared as valid as if both parties had attended.—(9 and 10 Vict., c. 95, s. 80.)

This anxiety in English practice, that a defendant shall have due notice of action, and, in his absence, that justice shall be done him, contrasts favourably with the loose practice of our courts, at least in the matter of citation.

The rules in Scotch law applicable to citation are to be found in the statute 1540, c. 75, which enacts: "Gif the officers cannot apprehend the defenders personally, they sall passe to the zett or dure of the principal dwelling-place, quhair the person to be summond dwellis and hes their actual residence for the time, and there sall desire to have entresse, quhilk, if it be granted, they sall first schaw the cause of their cumming: *And gif they cannot get the partie personallie*, they sall schaw their letters or precept before the servandes of the house, or other famous wnesse, and sall execute their offices and charge, and thereafter sall offer the copie of the saidis letters or precept to ony of the servandes, whilk, gif they refuse to do, that they affix the samen upon the zett or dure of the persones summond. And suchlike *gif they get na entresse*, they first knockand at the dure sex knockes, they sall execute their office before the famous wnesse at the said house and dwelling-place, and affixe the copy upon the zett or dure thereof, as said is."

It is very clear that the *personal* citation of the party is here chiefly

relied on. Next, "*gif they cannot get the partie personallie*," service on the servants is provided for; and, finally, "*gif they get na entresse*," the copy of service may be affixed on the gate or door after six knocks on the same. The absence of this preliminary would be fatal to a citation by key-hole.—12th June 1707, Duff; Mor. 3775.

From the case of Duff, and an older decision therein referred to, it would appear that it was only where there were persons inside the house, and who refused admittance, that a key-hole service was allowed, and not where it was known to the officer that no person was within.

The fact of citation coming to the knowledge of the party is more essential in Scotch legal practice than in that of England. In the latter, decrees merely in absence, and on implied confession, are unknown; but the case must be proved in the absence of the defender exactly as if he were present. No doubt a decree in absence, in the ordinary courts of Scotland, may be opened up at any time before implement. But it is not so, as will be immediately shown, in the Sheriff's Small Debt Court, where, from the quantity and haste of business, and the absence of a professional Bar, such check is more required. Even in the ordinary courts, the reponing of a decree in absence at any time within forty years is attended with much inconvenience to both parties, by the death and removal of witnesses, and the necessary defect of memory regarding remote events.

In the first Small Debt Acts for the Justices, so anxious was the Legislature to secure that notice was given the defender, that, where citation was not given personally, no decree in absence was pronounced, but a second citation (*de novo*, as it was termed), either personally or at the domicile, was required. By the last statute regulating the Court of the Justices this safeguard was removed, and now decrees in absence may be given at once, on a citation of any kind. It is believed that not a few cases of oppression have been the result.

But the Sheriff's Small Debt Act has produced a fearful engine of oppression in this respect. The Act 1 Vict., c. 41, introduced a jurisdiction in a variety of cases where the value did not exceed L.8, 6s. 8d. (including sequestrations for rents), since extended by the Act 16 and 17 Vict., c. 80, to L.12, and which also authorizes sequestrations even for current rents.

No mode of citation is pointed out in the statute, and which, of course, is regulated by common law. The desire of the framers of the Act to insure *personal* citation is shown by double fees being allowed for that step—1s. being allowed where citation is given personally, but 6d. only if not so given. This inducement is but small guarantee where a worthless Sheriff-officer acts in collusion with an unprincipled, or, it may be, pretended creditor.

Witnesses are dealt with in the same way. A person may be cited by a key-hole citation, and, though ignorant of such being given, he is made liable to be apprehended and imprisoned, and fined 40s., for supposed contumacy and contempt of Court.—(Section 12.)

Even in the early period of Lord Stair (1681) this sleight of hand was not unknown, for thus writes his Lordship :—"If the officers get not entrance, they shall first knock at the gate or door six knocks, and shall affix the copy upon the said gate or door. These knocks are not to be given if there be access to the rooms where the servants are. But those who design to steal through sentences without lawful executions, do either give no knocks, or not such audible knocks as may be heard in the rooms of the house, and sometimes they cause carry away the copy after they have affixed it, whereby these executions will not only be a falsehood but a forgery."—Stair, B. 4, T. 38, § 15.

These fears are not illusory. It requires only to examine the rolls of Small Debt Courts to discover the great proportion of "*key-hole*" citations over the other modes, and the paucity of personal summons. Working men, and their wives too, are generally from home except at meal times and at night. The six audible knocks, which obviously were intended for the ears of some one within, are a solemn mockery. The copy citation is disposed of sometimes below the door, and at other times placed in the key-hole, where its capacity is sufficient. It is believed that cases have occurred where the inmates were watched until they left the house, that the *secret service* system might have its full scope. Officers have been known to remove the paper from the place where left, satisfying their "*hot-iron seared conscience*" that they had *first* left it. In other cases the paper becomes the sport of the winds or the weans, which alike are rampant in the huge barracks of the working classes. Even though permitted to remain dormant where laid, the gude wife on coming in is often unable to read, and may con-



sign the dirty paper to the fire, thinking it some advertisement of quack medicine, or a tax paper, of which it may be as well to pretend ignorance. Indeed, even citation left with the wife is not in all cases safe. In one case, where the debt was for strong drink supplied to herself, the wife prudently concealed both the citation and the charge, and the unfortunate husband first heard of the claim by finding his house displenished at the suit of a retailer of whisky.

A curious question may some day arise with reference to edictal citations. In ancient times the citation was given with a pomp and circumstance befitting the magical, with which, in the eye of the law, it was invested. The letters were read with sound of trumpet, and with the loud "*Oyess*" (Hark ye!), at the pier and shore of Leith. These echoes of the majesty of the law were supposed to reverberate far beyond the Pillars of Hercules, and the paper consigned to the waves was presumably wafted to the place where the party summoned might happen to dwell, if within the limits of this mundane system. In this prosaic age a much less imaginative system has been introduced. The pier and shore of Leith have been metamorphosed and epitomised into a small room in the Register House, and the copy of the writ is left with an officer of this *Foreign Office*, and by him printed and published.

The Act 6 George IV., c. 120, which introduced this more sensible but less sentimental system, provides for the service being "done and performed by delivery of a copy at the Record Office of the Keeper of the Records of the Court of Session, *in the manner now practised in cases of citation or charge at the dwelling-house of a party not personally apprehended.*" Now, let it be asked, is it not thus made competent at any hour of the day or night, when the Record Office is shut, after the statutory number of sturdy knocks, to affix the copy on the key-hole, and thereby at once satisfy the law, and astonish the absent keeper when next morning he seeks admission into his sanctuary, thus so unscrupulously invaded?

By the 15th section of the Small Debt Act, where the defender, however cited, does not appear, decree is authorized to be instantly given against him. The defender may be reponed against this decree, but only on consigning the expenses awarded, with an additional ten shillings—a severe penalty on a poor man who may never have heard of the summons. But the iniquity does not stop here. If a charge has been given, which may, like the summons, be also left at

the door, then after three months the decree becomes as unalterable as the decrees of the ancient Medes and Persians, "*which altered not.*" After this brief period the unfortunate defender is at the mercy of the pursuer, who, for a fictitious claim of debt or damage, can pounce on the person or property of the defendant. Thus, without the slightest notice of the proceedings reaching him, he may find himself inside a prison (if the sum is between L.8, 6s. 8d. and L.12), or learn that his most valued effects have been sold for nominal sums at the market cross. All this may be perpetrated without any remedy within reach. The Sheriff has no power of interference. There may be a remedy in the Supreme Court; such is at once difficult from its cost and the means of *proving* the falsehood of the return or execution of citation.

The danger of the system is apparent, and has in several instances been realized, that some remedy is demanded, whereby there may be greater certainty of citations being made known to those for whom intended. Advertisement in the local papers might be required, where appearance is not made on a key-hole citation, before final decree is given forth.

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#### PRACTICAL AMENDMENTS IN THE CRIMINAL LAW.

NOTWITHSTANDING that the criminal procedure of Scotland is upon the whole satisfactory, and that the principal objects which it has in view are attained with tolerable economy and regularity, there are a number of defects attending it, which, though rarely of importance enough to attract the attention of the public, cause at times much hardship in individual cases. Some proposed improvements in this department of law have, indeed, received attention. Among these may be mentioned, the giving of expenses to parties acquitted, the allowing of an appeal on points of law from the Circuit Courts to the High Court of Justiciary, and the more frequent holding of Circuit Courts. These improvements will probably be adopted, but perhaps not until simultaneous improvements are being made on the law of England. Until public prosecutors have been instituted in the sister country, it is useless to endeavour to create a uniform system of criminal procedure in the British Empire. That we shall one day, however, have such a system, is

undoubted ; but the day is certainly distant, and in the meantime we may proceed with the attempt to render our own system as perfect as possible. The improvements advocated in the following pages involve no fundamental alteration in the principles of our law, or on the constitution of our criminal courts. They might, therefore, be adopted at once, provided the public were satisfied as to their beneficial results, since they could have no effect in retarding any more extensive changes which might afterwards be thought advisable.

I. One of the first steps after the apprehension of a person charged with a crime, is to take his examination before a magistrate. There is no objection to this step as a means of guiding the magistrate as to the course to be pursued in committing or discharging. But the step is rendered almost useless for this purpose, by its being made to serve another and quite a different purpose. What is now undoubtedly the chief object of the examination, is to obtain from the accused a declaration to be used against him as evidence at his trial. To this proceeding there are many objections.

Against using declarations as evidence there may be urged all the objections which have been entertained against asking men to decide upon evidence which they have not heard, given by witnesses whose conduct they have not seen. The conduct of the accused party under examination may have been so fair and frank as to impress the magistrate with a conviction that he was speaking the truth, or it may have been so wary as to leave the impression of an opposite conviction. The true declaration may nevertheless contain errors and inconsistencies ; the false declaration may be consistent, and the falsehood incapable of detection from a mere reading of the document. The jury are left to guess how the accused conducted himself at the examination. The story given them to consider is not the accused's own story taken down in his own words. The order of arrangement is that in which the procurator-fiscal has put his questions, the words of it are the words which the same official has used or suggested. One is almost tempted to doubt whether the task of weighing the truth or falsehood of a declaration has not been imposed on the jury with a view of perplexing rather than assisting their deliberation. If it could be assumed that every false answer given in such circumstances was evidence of guilt, and every true answer evidence of innocence,

their task would be easy. This, however, is a mere metaphysical theory, contradicted by common sense and experience. An innocent person may tell falsehoods from sheer stupidity, or because he is afraid that every admission he makes will be used against him. The real culprit may tell the truth on some points from considerations of policy. The result is, that the jury are required to value the most unsatisfactory description of evidence, under circumstances the most disadvantageous.

Nothing can better illustrate the comparative worthlessness of declarations in the scale of evidence, than the fact that they are regarded as evidence only upon one side of the cause. It is, perhaps, more correct to say that the declaration is only *admissible* at the instance of the prosecutor; for, once it has been admitted, it is, of course, evidence either for or against the prisoner, according to the view the jury may take of its credibility and import. Even in this view, however, the system is unfair to the accused. If the document is evidence, it should be admitted *valdeat quantum*, either against the prisoner or in exculpation; and it savours somewhat of Draconic legislation to give the prosecutor the power of availing himself of every admission a prisoner may have made, and to deprive the latter of the right to tender in evidence such explanations as he may have given. It would, perhaps, be fairer not to use against a prisoner any but spontaneous statements made previous to apprehension; but if we cannot do without an examination, it ought to be taken, as in France, in open court before the judge, where every statement might have its effect for or against the party, and where he might have the benefit of professional assistance, and the protection of publicity.

II. There is another defect in our criminal procedure not often remarked upon, but at the same time of a very serious nature. It would certainly astonish those who are unacquainted with our legal system, to be told that in Scotland a person may be brought to trial for the gravest offence without knowing one word about the charge, except what is contained in the indictment, and without any intimation of the nature of the evidence that is to be adduced against him. The law supplies him with the names and addresses of the witnesses, and there it stops. It will not help him to ascertain what they are to say. Usually, the Crown witnesses are considerate enough to allow themselves to be precognosed; but occasionally

ignorant, prejudiced, or dishonest witnesses refuse, and against their refusal there is no appeal.

As an illustration of the abuses to which the system gives rise, we may be permitted to mention two cases which fell within the sphere of our practice, and with the details of which we are perfectly familiar. In the case of Aitchison and Cockburn, tried at Jedburgh Autumn Circuit in 1859, for rioting and breach of peace, the chief witness for the prosecution was a policeman. Some eight individual instances of assault were charged, and this policeman had, according to his evidence, been everywhere, seen everything, and known everybody. He had refused to be precognosced, so that the defender knew nothing of what he was going to say, and had no opportunity of inquiring into the truth of his story, or of ascertaining whether he could or could not have been as ubiquitous and as observing as he professed. Had the other witnesses taken the same course, defence would have been impossible, though, as the case turned out, one of the parties was acquitted. The case, however, affords a fair example of the mischief the system is calculated to allow. It affords room for the easy practice of successful perjury. The perjury may easily pass undetected at the time; and, if so, it will probably pass unpunished, because, after sentence, the interest felt by the prisoner's advisers in the matter ceases in all but the few cases which do not belong to the poor's roll. The second case alluded to was that of Ann and Margaret Milligan, tried at the Glasgow Spring Circuit of 1860 for murder. The deceased was found murdered in her house in the forenoon. Two girls, who had been playing near the house-door, spoke to the discovery. They had seen a man come out, and leave; and a minute or two after this, one of them had entered, had seen the dead body, and had given the alarm. All this, it was ascertained from the girls, had likewise been witnessed by a woman, one of the Crown witnesses, who positively refused to give any information for the defence. The accused had slept in the house the night before, and had last been seen in it about two hours before the discovery, while the deceased was in life, and all apparently on friendly terms. They were not seen in the house again, and a few days afterwards they were found in Ireland with a quantity of the deceased's wearing apparel in their possession. The man who had left the house before the discovery had fled; and a man who had slept in the house the night before, had taken the same course. Were these the same men, or

were they connected, or had either of them the opportunity of committing the murder? These were questions most material for the defence, as upon the answer to be given to them depended in great measure the line of cross-examination to be taken. When the woman who had discovered the body was examined (which was not till the trial had proceeded for some time), she gave a description of these men differing materially from that given by the girls, and, if she spoke the truth, put the question at rest by swearing that a very few minutes before the last mentioned man came out of the house, she had seen him knocking at the door for admittance. This was the most damaging evidence for the defence in the whole case; because it showed that the man who left the house before the discovery could scarcely have been concerned in the crime. As the result of the trial was an acquittal by a narrow majority, it may easily be imagined how important for the purposes of defence the evidence so industriously withheld must have been.

The practice of the Scotch law in this matter is quite exceptional. In England the accused has ample opportunity of knowing what is to be advanced against him. The depositions are taken in public before a magistrate, and he is entitled to a copy of them. His advisers may likewise hear the Crown evidence repeated before the grand jury. In France the accused gets a copy of the depositions, which are then taken by the procurator-fiscal in presence of a magistrate.—(*Code d'Instruction Criminelle*, sec. 305.) The same course is followed in most of the German States. Even if it were not deemed practicable to introduce here either the English or French system, with the advantages attendant on publicity, the necessary information should at least be put in the power of the prisoner, and this might be done by giving authority to the agent of the accused to precognosce. Occasional inconvenience might result from the existence of such a power; but the truth is, that information is never refused by the intelligent and respectable; and there is no reason why the accused should suffer for the obstinacy of those who are not. Power might be given to summon before a magistrate any person refusing to answer any questions pertinent to the issue, and then to enforce answers. The power would rarely be abused; because it is very seldom the interest of the accused to irritate and annoy a witness before trial. Such authority might also be given to the magistrate as would prevent

all risk of it. Powers similar to what is here sought have always pertained to the public prosecutor in regard to witnesses, whether they be for the prosecution or for the defence; and this affords a reason for extending it, since the acquittal of the accused, if innocent, is of infinitely greater consequence to the State than his condemnation, were he ever so guilty.

III. The next defect in our criminal procedure which we shall notice, is the absence of any provision for making *post-mortem* examinations in cases of death from suspected crime, and the absence of any provision for preserving the report of the appearances on dissection when such an examination has been made. Some regulations have indeed been made by the Crown officers, but they are very far from being complete. The procurator-fiscal may employ what medical men he pleases to make the examination, and the medical men employed may make such a report of the appearances as suits themselves. No magistrate need be present, and no one can attend to watch the interests of the accused. It depends upon the favour of the prosecutor when the prisoner sees the report, if indeed he ever see it at all; for there seems no legal necessity for its production. The report may be deficient in every way; it may omit the description of organs the most important; may be such as to give another medical man who has read it no idea of the cause of death; and yet the accused cannot complain. He has not even the right to have the defects remedied by precognition. For information as to the medical facts in the case, he is completely dependent upon the charity of the medical witnesses. Fortunately, he seldom appeals to a medical man in vain for information; but the law ought to provide for the embodiment of all needful information in the report; and the report should be equally accessible to the accused as to the prosecutor.

The desirableness of having some regulations for taking *post-mortem* examinations appears to have struck our contemporary, the *Edinburgh Medical Journal* (May 1858, Vol. iii., p. 1041), the conductors of which have taken the trouble to furnish a translation of the Prussian regulations on this matter. Certainly the absence of regulations is not less unfair to the medical profession than it is to the accused. There may be a few members of the profession in the large towns who have opportunities of learning what the law requires from them in making *post-mortem* examinations,—what facts they

ought to record, and how they are to record them ; but to the great majority of the profession a legal *post-mortem* examination is a thing which occurs once or twice in a lifetime ; and if left without directions, they make the report with such fulness and in such form as recommends itself to their common sense ; and the results, at all events, commend themselves to lovers of variety.

IV. Passing over various other matters which might possibly have afforded occasion for observation, the next provisions of our law of criminal procedure which seem most to stand in need of alteration are those regarding the libelling and proving of previous convictions. The indictment enumerates the previous convictions to be proved, and the proof of these is taken before a verdict is returned upon the principal charge. Counsel, in addressing juries, have a constant topic for declamation in urging upon them that they must throw the previous convictions altogether out of view in considering their verdict upon the principal charge. The warning is perhaps repeated in more telling language by the judge. Yet every one knows that the juries are asked to perform an impossible task. Evidence of previous convictions is just evidence to character ; and, in weighing other evidence in any degree doubtful, it is impossible to throw out of view evidence to character, whether good or bad. If it be considered desirable to convict bad characters upon doubtful evidence, the present mode of dealing with previous convictions is, of course, right. If other views prevail, we must follow the system adopted in England, and not meddle with the previous convictions till after the verdict has been returned upon the principal charge. In this way of proceeding, the convictions would not be recited in the indictment, but written notice of those to be proved would be served upon the panel. The evidence of these would, if necessary, be sent to the jury ; but in most cases the necessity for this would be obviated, and the not at all edifying spectacle of criminal officers giving testimony would be avoided, if power were given to ask the panel to plead to the previous convictions. By proceeding in this manner, some certainty would be attained that the proof of the previous convictions affected the only matter it is meant to affect—the amount of punishment.

An anomalous consequence of our present procedure is, that previous convictions can only be proved when they are for the same technical denomination of crime. A criminal may have been all his



life a thief; if he turns robber, he is to be treated as a first offender. He may have been often convicted of embezzlement; if he varies his way of life, and takes, say, to forgery, he is again viewed as a first offender. The effect of this state of the law may be at times odd enough. The pickpocket, who for his next offence might have had ten years' penal servitude as an incorrigible thief, may escape with four years as a young robber, if he have only first given his victim a moderately good thrashing. Limiting the kinds of previous convictions to be proved has an air of humanity about it, but it is mistaken humanity. A criminal is no better because he changes from one breach of the law to another, and to the public it signifies nothing that a man who lives habitually upon his neighbour's property has discovered a new *modus transferendi domini*. It only proves that he is a more skilful and dangerous character, and more deserving of severe punishment. The question of the amount of punishment to be given is so entirely one of circumstances, that a judge can never have too much information as to the previous career of a convicted person. It would not be going farther than was justifiable, to allow all previous offences against property to be proved in the case of a conviction for an offence against property; and, if the punishment to follow were not necessarily capital, to allow all previous offences against the person to be proved in the case of a conviction for an offence of that kind.

V. The last amendment we have to suggest, would consist in putting the prosecutor to his election, in cases of proper alternative charges, to say, at the close of the proof, upon which of the two charges he asked a verdict. There are cases in which it is allowable to send to the jury what appears to be an alternative charge, as in the cases of theft or robbery, assault or rape, manslaughter or murder. In these cases, however, there is no real alternative, and it would not be difficult, if the law permitted it, to frame indictments which should not involve even an apparent alternative. Such indictments truly contain cumulative charges, but there are others where the alternative is real. As examples, may be mentioned, the cases of theft or reset of theft, and embezzlement or theft. In such cases, the prosecutor sends to the jury either a contradictory statement, or he asks them to decide a question of law upon the import of his evidence. Neither of these things has he any right to do. He is bound to know the effect of his evidence, and to know what

crime he has proved. He is entitled to ask for a verdict for that crime, but he is not entitled to ask for a verdict for another crime, which he must know that he has not proved. The course of leaving the alternative charges in the hands of the jury, is taken because it is convenient for the prosecutor, who always takes as great a latitude as he can get; and it is just possible that behind the custom may lurk some confused idea, that half a case upon one crime, and half a case upon another, make out a whole case for a conviction. The practice may, however, be at times more convenient for the accused. In one case (Kneen, 28 June 1858, 3 Irvine's Reports, p. 161), a jury returned a verdict of guilty upon an alternative charge of breach of trust. The case was sent back to them, with a direction that, if anything was proved, the case was one of theft. The jury retired again, and after a while returned with a verdict of not proven. In this case it will be admitted that it would have been wiser to have withdrawn at first the charge of breach of trust.

Formerly it is believed to have been the practice of the Crown, not indeed to withdraw one of two alternative charges, but always to do what is certainly the next best thing,—to state upon which alternative it was thought a verdict should be returned. This, however, was in the time when Crown lawyers were less chary of their eloquence. The idea, that in ordinary cases it is not necessary to state the case for the prosecution, had not then occurred. Prisoner's counsel would not have regretted had it still remained unknown. Crown counsel do not abstain from addressing the jury, with any view of not pressing the matter against the accused. The object is to prevent the prisoner's counsel knowing what are considered the strong points of his adversary's case, or the weak points of his own; in short, to take the wind out of his sails. The latter takes his revenge, by conjuring up every argument, good, bad, or indifferent, that might have been used against him, demolishing one after the other with the energy of the knight of La Mancha. Ill-natured people, however, will suggest that the suppression of the prosecutor's speech is the most effectual mode of inciting the judge to become "a terror to evil doers;" thus practically securing a last speech in favour of the Crown. The remedy lies with the Court. If the Advocate-Depute will not perform the duty for which he is paid, the judge is not bound to become a stop-gap for a badly fortified case; and it would be more for the interests of justice were he invariably to decline to occupy so anomalous and so invidious a position.

## THE MONTH.

*The New Law Examinations of the Glasgow Faculty.*—Our attention has just been called to a very interesting address, delivered on a recent occasion by Mr Bannatyne, the Dean of the Glasgow Faculty of Procurators, to a meeting of that body. The leading topic which Mr Bannatyne brought under the notice of the Faculty, was the propriety of raising the standard of professional culture among the candidates for admission to that body; and it is evident, from the manner in which he has dealt with the subject, that the views of the speaker are the result of a careful study of the question, and observation of the improvements that have been introduced into the system of examinations by other legal corporations. It is creditable to the good taste and judgment of the influential body over which Mr Bannatyne presides, that his proposals were received with marked approbation; and it is satisfactory to know that, in so far as they admit of being immediately carried into effect, they have already received the formal sanction of the Faculty.

For a complete abstract of the paper in question, we may refer the reader to our pages of Legal Intelligence. But there are some features of the plan which deserve a more particular notice, on account of their important bearing on the legal education of the country. We refer to the proposed system of periodical examinations; and also to the claim so justly advanced, for additional professors in the University Faculty of Law.

The subject of examinations naturally suggests the remark, that the requirement of certificates of attendance at classes is a very inadequate and deceptive test of the attainments of the student. It is quite right that attendance at classes should be enforced; for it would be useless to provide the machinery for giving a liberal education to the student, if he were to have the option of dispensing with its aid to suit the convenience of the moment. But however useful law lectures may be, it is quite possible, as every student knows, to hear them read without burdening the memory with much of their contents; and Mr Bannatyne justly observes, that it is impossible, without encroaching too much on the lecture hours, for the professor to institute a searching examination into the proficiency of his pupils. Pass examinations for admission to the profession are liable to this objection, that they are invariably made

the subject of "cram;" and it is a fact, that a surfeit of knowledge crammed into the system within a limited time is, like a surfeit of food, incapable of being assimilated. The mass of new ideas bewilders the memory, and is also injurious by inducing a false reliance on the result of studies hastily prepared and as speedily forgotten. With the view of checking the tendency to this lazy habit, the Glasgow Faculty have agreed, on the suggestion of Mr Bannatyne, to institute annual examinations of the apprentices to members of their body,—these examinations being both theoretical and practical, and adapted to the state of proficiency which may be expected from students of the different years. Some of the topics suggested may appear too trivial to be the subject of formal examination; but when it is remembered that the examinations are to be followed by certificates of merit, and that such certificates will be made use of by young men in want of situations, it is obviously desirable that they should be of a nature to testify not only as to the applicants' literary qualifications, but also as to their knowledge of the ordinary duties of their station. The examinations, we may add, are quite voluntary, but we have little doubt that they will be well attended.

On the subject of additional law professorships, the profession will sympathize with the views of Mr Bannatyne and the Glasgow Faculty. It is notorious that the means of legal instruction in Scotland are very defective. Even in London the profession are taking measures for extending the system of tuition, while our Universities still lag behind, with their single professorships of municipal law. We trust the Glasgow Faculty may succeed in inducing the University Commissioners to sanction the endowment of Chairs of Conveyancing and Civil Law. At the same time, we would suggest, for the consideration of the profession in Edinburgh, whether it is right that they should allow their University to be deprived of its ancient pre-eminence as a seat of legal learning. The advances made by the metropolis of the west ought to stimulate the lawyers of Edinburgh to fresh exertions in the cause of legal education. We cannot help thinking that, if the right of teaching were opened to the profession, by the recognition of extra-academical chairs, there would be no difficulty in obtaining the services of qualified lecturers in all the departments of legal science which it might be thought expedient to erect into separate departments of study.

*The Lord Advocate on Social Science.*—The address of the Lord Advocate to the Law Department of the Social Science Association

will naturally be read with interest by the members of the profession. Both in style and in the choice of topics, this address bears a strong resemblance to that which he delivered in April, at the request of the Edinburgh Trade Protection Society. Indeed it could not well be otherwise. The comparison with the municipal law of the two divisions of our island was, of course, a subject prolific of observations, as was that panacea of sociologists, the codification of the laws. The Lord Advocate pointed out very perspicuously and clearly the causes which render the consolidation of statutory law a more easy task when applied to Scotch statutes than it is with those of the sister kingdom. May we not, therefore, ask, why is it that we are so far behind our neighbours in this most useful, though mechanical, department of legislation? Two departments of the law we could mention in which the work would be easy and the results most valuable. We refer to the criminal law and the procedure of the superior courts. We understand that an edition of the statutes relating to process is already in the hands of the printer; may we hope, after the bulk and intricacy of the law is thus palpably exhibited, that the Lord Advocate will see the necessity of carrying out practically the suggestions which he has communicated to the Association.

Passing over the observations on the distinction (so uselessly maintained in England) between bankruptcy and insolvency, we refer with satisfaction to the Lord Advocate's remarks on the Land Question. The subject of entail is dealt with in a bolder and more comprehensive spirit than that which pervaded his former address. We think, however, that his Lordship is mistaken in supposing that public opinion would not admit of a complete subversion of the law of entail. When Lord Rutherford's Act has come into full operation, entail will be a mere figment of the law, ostensibly providing for a perpetual succession, but in reality defeasible at the pleasure of the heir in possession. When that time comes, it is not difficult to foresee that the form as well as the substance must be swept away; nor, do we think, that an acceleration of the doom which awaits this relic of feudal supremacy would meet with much opposition from the landowners. On the conveyancing question, the Lord Advocate merely repeats what all conveyancers are agreed upon, that no further simplification of titles is practicable without abolishing mid-superiorities. This is a question partly economical and partly legal. Our own opinion has always been, that the abolition of superiorities, by facilitating transactions in land, would

ultimately tend to the benefit of the profession, though, it is obvious, that many individuals would suffer by the change.

*Criminal Investigations.*—Among the topics discussed in the Law Department of the Social Science Association, that of criminal procedure occupied a prominent place. Some criticisms on the subject, so skilfully handled by Lord Ardmillan, the examination of prisoners in their own cause, will be found in another place. The last two months have been remarkable for the number of undetected murders which have occurred both in this country and in England. While the English press has been complaining of the inadequacy of their system of coroners' inquests, and demands have been made for the appointment of a Special Commission to investigate the Road tragedy, public opinion in Scotland is equally strong in the conviction that some amendment is required in our system of investigation. Perhaps the best system would be one which combined the most approved features of the two systems. The great defect in the Scotch system of investigation is the want of the element of publicity. It is notorious that, even in recent years, public prosecutions have failed because witnesses able and willing to give evidence on essential points, have learned, for the first time, on reading the report of the trial, that their evidence was requisite. Such miscarriages in the administration of justice could scarcely occur, were the Crown examinations taken in public and reported (as they would be in all important cases) by the press. We do not mean to affirm the existence of any particular virtue which may be supposed to reside in the inquisition by a coroner and a jury of twelve. Jury trial can be of little value where the object is merely to ascertain the circumstances attaching suspicion to certain individuals as concerned in an act of crime; and we are free to admit that an examination *more Scotice* by the Procurator-fiscal before a Sheriff, is as likely to elicit valuable evidence and to lead to the discovery of guilt, as the more formal method of trial which custom has sanctioned in England. But we cannot conceive what interest the public can have in allowing such examinations to be conducted in secret; and we are more than ever convinced by the unsuccessful results of recent criminal investigations, that until the public are put in possession of the evidence elicited under the direction of the public prosecutor, there can be no security that all the proof of which the case admits will be available for the purposes of retributive justice.

## Legal Intelligence.

WE understand that Mr Robert Bell has resigned the Sheriffship of Berwickshire; and that Mr Young will be appointed to the vacant office, resigning his present appointment. Mr A. R. Clark, who resigned the office of senior Advocate-Depute a few months ago, will, in that case, receive the appointment of Sheriff of Inverness-shire.

**LAW EDUCATION IN GLASGOW.**—The following is an abstract of the proposed amendments in the system of education for the apprentices under the Glasgow Faculty of Procurators, as developed in Mr Bannatyne's address to the Faculty:—

1. To fix the beginning of apprenticeships at 17 years of age, still, however, keeping the term of apprenticeship at five years, and one year of clerkship. This would bring parties to 23 years of age before they could enter the Faculty.

2. A gradual elevation of the standard of educational qualification, both for apprenticeships and admissions to the Faculty.

3. To institute *bona fide* examinations, so as to ascertain that the requisite qualifications have been actually attained.

4. Refers to an appended schedule (A) containing an outline of the subjects proposed and the periods for examination, which is divided into two parts: (1) on application to be allowed to serve as an apprentice, and (2) on application for admission to the Faculty; which last is subdivided—(1) general, and (2) professional. To assist the Dean and Council in these examinations, experienced persons may be called in, and the questions, so far as practicable, to be answered in writing.

5. Periodical examinations of apprentices and clerks; and this perhaps is the chief novelty of the scheme. These examinations to be once a-year, and conducted by the Dean and Council, or a Committee of the Faculty, and to be voluntary. The subjects and periods of examination are placed under four heads in a schedule (B) appended to the pamphlet. Class I. For those who have not been more than one year in an office; Class II. For those who have been from one to two years in an office; Class III. For those who have been from two to three years in an office; and Class IV. Those who have been three years and upwards in an office. Re-examinations may be ordered on subjects of previous examination. The stimulants to these voluntary examinations are certificates of proficiency and prizes.

6. Prizes to be given for essays on legal subjects, and lectures to be delivered by eminent lawyers and others on such topics as international law, codification, assimilation of laws of different States, mercantile usages, and speculative questions connected with the amendment of the law.

We print at length the portion of the pamphlet which refers to the proposed periodical examinations:—

"5. There is a farther application of the system of examination, which has not yet been adopted by any other professional body, at least in Scotland, but which appears to me likely to prove very valuable in converting the young men usually employed in our writing chambers into well-trained practical lawyers, and intelligent and exact men of business. What I propose is *periodical* examinations, so directed as to test the progress of the parties examined, from time to time, in that technical knowledge which it is the intention of a service for a term of years, in the chambers of a master, to bestow.

"Of course it is not intended by this proposal to interfere directly with the routine or system of management pursued by the master in his writing chambers. As he has the responsibility, so must he have the control, and be left to the exercise of his own discretion as to the way in which he can best combine the execution of the work to be performed, with the instruction of his pupil or clerk. Still I hope it will not be presumptuous in me, if, in passing, I remind my brethren how much greater benefit a young man derives, as well as how

much more useful he becomes to his master, when some pains are taken to explain to him, in a few words, the object and effect of anything he may from time to time be instructed to do, and when he is thereafter invited to draw on his own resources in order to work out the problem. But, to return from this digression, it appears to me that to establish periodical examinations under the direction of the Faculty, would not in any way interfere with, but rather recognise and strengthen, the control and discretion of the master.

"Such examinations would be of use, (1) by stimulating the young men to exertion; (2) by affording them, in the shape of certificates of proficiency, the most honourable and serviceable testimonials they could procure; and (3) by rendering them much more useful to their employers during the whole term of their service. The framers of the Bill for the amendment of the existing English Statutes seem to have viewed this question in somewhat the same light, for they propose, as already explained, to authorize the Judges to establish periodical examinations in legal knowledge, during articles, and to extend the examinations before admission to all matters of business usually transacted by attorneys.

"But, it may be asked, how are habits of business and mental training to be tested by examination? There are no doubt many things the progress in which cannot be directly ascertained by such means—regularity in attendance, willingness to work, and such like. But the proposed examination, although necessarily confined to subjects of a different kind, may be so contrived as to afford indirect evidence even on these features of the conduct and character.

"What I have to suggest on this part of the subject for your consideration is, that the Faculty should fix certain stated times for examinations, probably once a-year. At the times so fixed, I propose that the Dean and Council, or a Committee of the Faculty to be specially appointed for the purpose, should proceed to examine as many of the apprentices and clerks as may choose voluntarily to come forward, and to grant to each of them such a "Certificate of Proficiency" as his examination may entitle him to. In order to enable the young men to be classified for these examinations, an explanatory statement might be circulated beforehand, indicating generally the nature of the subjects on which those who entered their names for examination in any one of four or five classes might expect to be examined.

"It would be premature, at present, to attempt to arrange the detail of subjects appropriate to each of these classes, assuming them to represent the probable progressive advancement of an apprentice or clerk during a period of four or five years; but I beg to refer you to the Appendix for a general indication of their character and classification. The standard of acquirement ought to be varied from time to time, according to the education and training which the young men are in the habit of receiving prior to entering on their professional duties.

"Each apprentice or clerk wishing to be examined might be allowed to choose his own class, and even to some extent to select his own subjects for examination—the certificate granted being of course made to correspond.

"In addition to the proposed certificate, which I think would be of value to a young man seeking for new employment, I would suggest that the Faculty should give prizes to those who had passed the best examination in each class, allowing the successful party the option of taking it either in money or in books.

"If some such plan as that I have now sketched, in the maturing of which the practical experience of the members of Faculty would be of the utmost value, were adopted, I have little doubt that Glasgow, which is already a great school of practical instruction in our branch of the legal profession, would be still more largely resorted to by the youths who are preparing for business in various parts of Scotland for the purpose of completing their education."

**THE RESPONSIBILITIES OF TRUSTEES.**—The subjoined letter addressed by Lord St Leonards to the *Times*, and inserted in its city article, explains the precise



bearing of the Trust Money and Law of Property Amendment Act recently passed :—

"SIR,—In your money article of Monday last, it is stated that the 23d and 24th Victoria, cap. 38, empowers the Court of Chancery to invest trust funds in the securities raised under the authority of Parliament, such as those for the West India Islands, Turkish Guaranteed Four per Centa., etc., upon petition being presented by any of the parties interested. I believe that you will do good service by informing trustees and the persons for whom they are trustees how the law really stands under the two Acts of the last two sessions, for which I am responsible. I am not surprised that, in this day's paper, it is stated that the Act of the session just ended was brought forward by the Lord Chancellor, for his name was on the back of it, owing to his having, at my request, in my absence, laid it on the table and moved the first reading in the House of Lords—a matter of form. That was framed and carried through by me chiefly as a supplement to the Act of the previous session.

"Now, the law stands thus :—By the 32d section of the 22d and 23d Victoria, cap. 35, where a trustee is not, by some instruments creating his trust, expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or in the Stock of the Bank of England, or Ireland, or East India Stock, it is lawful for him to invest such trust money in such securities or stock, provided that such investment shall in other respects be reasonable and proper; and by the 12th section of the 23d and 24th Victoria, c. 38, this clause is made to operate retrospectively. By the last-mentioned Act, the Lord Chancellor, with the advice of the other equity judges, or any three of them, is empowered to make such general orders as to the investment of cash under the control of the Court, either in the Three per Cent. Consols. or Reduced, or New Bank Annuities, or in such other stocks, funds, or securities as he shall with such advice see fit; and power is given to the Lord Chancellor to convert any Three per Cent. Bank Annuities, standing or to stand in the name of the Accountant-General of the Court in trust in any cause or matter, into any such other stocks, funds, or securities upon which, by any such general order as aforesaid, cash under the control of the Court may be invested. The orders for the conversion are to be made upon the petition of any of the parties interested. By the same Act, trustees having power to invest their trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, may invest them in any of the stocks, funds, or securities in or upon which, by such general order, cash under the control of the Court may be invested. The result is, that trustees (including executors and administrators) may, unless forbidden by their trust, invest the trust fund in real securities in Great Britain, or in Bank Stock of England or Ireland, or in East India Stock, which has been held to mean the Old East India Stock. The Court itself can invest cash in such stocks, funds, and securities as it shall see fit, and make a general order for the purpose; and upon the petition of parties interested. Three per Cents. may be converted by the Court into such securities as cash may be invested upon under any general order; and trustees, with the usual powers to invest, may resort to the same securities. The power to the Court is general, and does not enumerate any particular securities, as it was considered that there was no danger of this power being unduly exercised. The principal assuredly will never be placed in danger in order to obtain a large interest. The 32d section of the 22d and 23d of Victoria, cap. 35, is not properly framed, but it is not likely to be abused, as trustees will, no doubt, act with great caution under it. By the Bill of the late session, as it was sent to the House of Commons, this clause was repealed, but that House not only rejected the repeal clause, but made the original clause retrospective. The new clauses relating to trust funds, in the Bill of the late session, were framed by me, with the approbation of all the equity judges, and invited in the House of Commons. There was another clause in substitution of the 32d section of the 22d and 23d of Victoria, cap. 35, which that House, of course, objected to adopt, as they were determined to retain the 32d section as it stood."

## New Books.

### ENGLISH LAW BOOKS OF THE SESSION.

*The Law of Partnership, including Joint-Stock Companies.* By  
NATHANIEL LINDLEY, Esq. London: W. Maxwell.

It is in the department of special treatises that the law literature of Scotland is most deficient; and it is accordingly to works of this description that the Scotch lawyer will look for assistance when consulting the more extensive stores of learning accumulating by the English profession. In the department of mercantile law especially, there is a singular paucity of special treatises; even the extensive and intricate subject of partnership being absolutely untouched, except by the institutional writers. Although there are, undoubtedly, many important points of difference between the English and Scotch law of partnership, not the least being the recognition by our courts of the personality of the firm, still, as regards the equities of this branch of the law, and the various topics connected with the management and winding up of the partnership property, which constitute a fertile source of litigation, the English authorities may be consulted with great advantage.

In undertaking a new treatise on partnership, Mr Lindley has been spared the arid and unprofitable task of wading through the early authorities; for we may take for granted that the learned treatise of Mr Collyer, and the disquisitions of Addison and Smith, have been for him a mine of materials wherewith to construct the rudimentary portions of his edifice. Still, the task of collating the decisions of the last fifteen years must have been attended with great labour; and we are happy to add (having had occasion to examine several chapters of the work with care), that it appears to be thoroughly executed. Mr Lindley has the art of expressing his propositions neatly and clearly; and it is not too much to say, that throughout the chapters of these two bulky volumes, the reader will find little that is redundant, and very much that is relevant to the question he is seeking to solve, in the place where he expects to find it. Considering the extent of the ground occupied in this new treatise (embracing the whole circle of joint-stock statutory law, the law of banking, shipping, insurance, and other mercantile associations), and the accuracy and research which have been brought to bear upon its completion, we think we may congratulate the author on having made a valuable addition to the stock of standard English works, and one which will be appreciated by the profession here, as well as in the country to which it more directly relates.

*The Statutes, General Orders, and Regulations relating to the Practice and Jurisdiction of the Court of Chancery, etc.* By G. O. MORGAN, M.A., Barrister-at-Law. Second Edition. London: Wildy and Sons.

*Precedents of Pleadings in Actions in the Superior Courts of Common Law; with Notes.* By EDWARD BULLEN, Esq., and STEPHEN MARTIN LEAKE, Esq. London: Stevens and Sons.

WE have looked into both these works, which constitute the latest authorities on the pleading and practice of the courts of law and equity respectively. In reading the reports of English cases, the Scotch practitioner is frequently obliged to resort for explanations of the technical procedure to works of practice; and, although it is not likely that many of our readers will desire to add such works to their private collections, yet for purposes of reference they may be found useful in this country. To the gentlemen in our own courts entrusted with the duty of preparing records, a day spent in the examination of Messrs Bullen and Leake's precedents of pleading would not be time thrown away. The perusal of these methodical and carefully studied forms would bring very forcibly to his mind the contrast which exists between the mode of stating of pleas in Westminster Hall, and the loose, illogical, and desultory statements which find admission into our records. We say nothing, however, of Bills in Chancery, which are not a whit more rational than our own pleadings, and are infinitely more tedious. As regards procedure, we mean as distinguished from pleading, Mr Morgan's work may be advantageously consulted. On the subject of common law procedure, it is sufficient to refer the reader to the excellent treatise by Messrs Paterson, Macnamara, and Marshall, which has already acquired a reputation as the standard work on this department of practice.

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*A Practical Treatise on the Law of Marriage, Divorce, and Legitimacy, etc.* Second Edition. By JOHN F. MACQUEEN, Esq., Barrister-at-Law. London: Maxwell.

*The Practice and Evidence in Cases of Divorce and other Matrimonial Causes.* By R. T. TIDSWELL and R. D. M. LITTLER, Barristers-at-Law. London: Benning.

THE business of the Divorce Court must be increasing, since there is a call for a second edition of a Treatise on Divorce, by Mr Macqueen. The fact is also noticeable, as proving that the literary labours of that gentleman are appreciated by the English profession, a circumstance which confirms us in the opinion we lately expressed regarding the qualifications of the author. Mr Macqueen

ought to be well acquainted with the law of divorce; since not only does he report cases from the courts of a country which has for centuries dispensed justice to injured husbands and afflicted spouses, but he has also been, for a considerable time, official reporter to the House of Lords of the legal points which arise in the discussion of Divorce Bills. It is true that Mr Macqueen's Reports have given just cause of dissatisfaction in Scotland; but, as we have already had occasion to observe, his failings are attributable not to want of capacity, but to indolence or neglect. The volume before us demonstrates more plainly than ever the injustice Mr Macqueen has done to his own capacity for authorship, in the volumes which he annually presents to the Scottish profession. May we regard the publication of this really useful and well-digested manual as an earnest that Mr Macqueen is prepared "to tak' a thocht and mend?" If he will only bring to the compilation of the succeeding numbers of his Reports, the same care that he appears to have bestowed on the editing of this edition of his Treatise on Divorce, the public will have no further cause for complaints against the reporter.

Messrs Tidswell and Littler's work is occupied as much with the nature of the evidence required in divorce cases as with the actual practice of the Court. Both works may be consulted with advantage by the Scotch practitioner desirous of fortifying some new position in this interesting branch of law by an appeal to the practice of courts of correlative jurisdiction.

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## English Cases.

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**RAILWAY.—Responsibility of Carriers.**—A railway company received a dog, to be carried by them, upon a written contract, signed by the owner's agent, that they would not be liable for any dog above the value of L.5, unless a declaration of its value, signed by the owner or his agent at the time of booking, should have been given to them, and that by such declaration the owner should be bound; the company not being liable in any event to any greater amount than the value so declared. And that the company would in no case be liable for injury to any dog of whatever value, where such injury arose wholly or partially from fear or restiveness. And that, if the declared value of any dog exceeded L.5, the price of conveyance would, in addition to the regular fare, be after the rate of two and a half per cent., or sixpence in the pound upon the declared value, whatever may be the amount of such value, and for whatever distance the dog was to be carried. The value of the dog was not declared, and the dog was lost on the journey by a casualty. *Held*,—(1.) That this contract contained one entire condition, the meaning of which was, that if the dog was worth more than L.5, its value should be declared, and that then the company would not be liable in any event whatever, unless the extra charge of two and a half per cent. was paid. (2.) That this was a contract within the provisions of the 17 and 18 Vict., cap. 31, sec. 7, and that, under that section, it was incumbent on the company to show that the contract was just and reasonable. (3.)

That two and a half per cent. for all distances was *prima facie* an excessive charge for insurance; and the company not having shown it to be otherwise, the condition imposing it must be held unreasonable, and therefore void. (4.) That the condition being void, the company were liable, as common carriers, for the full value of the dog. *Semble*, that a condition by which the railway company were relieved from all liability, unless a reasonable rate of insurance were paid, is not void.—(*Harrison v. The London, Brighton, and South Coast Ry. Co.*)

**TRUSTEE—Removal by the Court.**—The mere fact of a trustee having been bankrupt, and nothing more, is not sufficient ground to remove him from the trust, under the 130th section of the Bankruptcy Consolidation Act of 1849.—(*Re Bridgman*, 8 W. R. 598.)

**WILL—*Conditio si sine liberis*.**—A testator by his will gave certain property to trustees in trust for the four children of his sister, and directed that "should one or more of them de cease before marriage, and leave no issue, then their part or parts shall fall to the remaining brother or brothers, or their issue, share and share alike." Two of the children died unmarried and without issue. Another died, leaving several children. The remaining child died married, but without leaving any issue. *Held*, that the word "and" could not be changed into "or," and therefore that the gift over to the children of the deceased child did not take effect. The M. R. observed—The cases of *Brownsword v. Edwards*, *Maberly v. Strode*, and *Bell v. Phyn*, were cited as strong authorities in support of the contention that "and" should be read "or;" and in a case exactly resembling the present, Lord Hardwicke construed the word "and" as equivalent to "or." That continued to be the doctrine of the courts for fifty years, when Lord Ellenborough thought it contrary to common sense to read "and" disjunctively; and accordingly in *Doe v. Jessep*, his Lordship decided that the word was to be taken in its literal sense. Since that time the decisions have fluctuated to some extent, while the later construction has been followed and confirmed by the late decision of the House of Lords in *Grey v. Pearson*. It is of the greatest importance for the protection of titles, that well settled principles of construction should be followed; and the House of Lords having considered the case, and determined that the views of Lord Hardwicke and Sir William Grant should be rejected, and the construction of Lord Ellenborough adopted, this Court is bound to follow that decision. I am unable to distinguish between the two cases. In *Grey v. Pearson* the words were, "subject to the trusts aforesaid, all the said premises herein before devised shall be in trust for my grandson, Robert Watson, and the heirs of his body; but in case he should die under the age of twenty-one years, and without issue," then over. I have read the observations of Lord St Leonards, who dissented, very carefully, but I feel bound to adhere to the decision of the House of Lords.—(*Seccombe v. Edwards*, 8 W. R. 595.)

**Specific Bequest—Failure of Purpose.**—Testator, by a codicil, revoked a bequest in his will of L.1000, to be applied in printing a MS. work, with certain directions, and left the MS. in trust for his grandson F., that the trustees might provide for the publication of the MS. to the best advantage for the interests of F., so as to contribute towards raising a fund to assist him at the university. "Should F. die before the book is printed, and it becomes profitable, towards the printing of which I bequeath L.1000, and C. has a boy, I wish him to inherit all the benefit that may be derived from this bequest." The book had never been published, as it was not thought likely to succeed. *Held*, that the primary object of the codicil being benefit to F., he was entitled to the L.1000, although the particular purpose to which it was to be applied had failed.—(*Re Skinner's Trust*, 8 W. R. 605.)

THE

# JOURNAL OF JURISPRUDENCE.

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## OUGHT THE OUTER HOUSE TO BE CONTINUED AS A SEPARATE COURT?

It is in no spirit of hostility to the Court of Session that we again solicit the attention of the profession to the urgent necessity which exists for carrying into effect those changes in the constitution of the Court of Session which experience has suggested, and which, it is generally admitted, have been too long delayed. Ten years have already elapsed since a material improvement was effected in our method of pleading by the Lord Advocate's Act of 1850. But, with the single exception of the clause in that Act (subsequently extended by the Sheriff Court Act of 1853) which enables either of the parties to dispense with a rehearing in advocations, there has not been, since 1825, the slightest attempt at innovation in the constitution of the Court of Session, or in that branch of procedure which is connected with the power of review exercised by the Court. It is therefore impossible, with any regard to truth or propriety, to say, that those who are bent on obtaining some modification of the power in question, are actuated by a spirit of discontent, or the love of innovation. Five-and-thirty years' experience of the existing system of procedure, under various modifications; ten years' experience of its working after everything has been done that experience could suggest to shorten writs, and facilitate the passage of actions through their various stages,—may at least suffice for a trial. It is rumoured that the English Bar, taking advantage of the discontent which has been freely expressed, are meditating an invasion of our territory; and it is not

too much to say, that it rests with the present generation of Scotch lawyers to determine whether they will acquiesce in the subversion of our ancient and renowned system of jurisprudence, or, by a just adaptation of our methods of procedure to the wants of the age, place the Court of Session in a position in which it may challenge invidious comparison or attack.

We shall not affront the understanding of our readers by advancing a single reason in support of our preference for the latter view of the alternative. There may be individuals in the profession so insensible to the advantages of local institutions, so imbued with that taste for dull uniformity which is characteristic of continental administrators, as to be incapable of appreciating the value of our courts as national institutions. To such men, *centralization* is not a term of reproach, but a recommendation. There are, however, other considerations more peculiarly affecting the profession, which are the less necessary to be dwelt upon, because their influence in modifying opinion is always instinctively felt, if not openly avowed. We do not, however, think it necessary to appeal to the selfishness of the profession to support our national judicatory, but may be content to rest their case on the opinion of one who, in all probability, devoted as much time to the study of comparative jurisprudence as the whole tribe of legists, ancient and modern, taken together. Mr Bentham, speaking of the anticipated importation of the English system of legal practice into Scotland, thus gave vent to his indignation in language more emphatic than polite. "I have no more apprehension," he says, "of seeing the Scotch nation submit to defile itself with any such abomination, than I have of seeing the Port of Leith opened for the importation of a pack of mad dogs, or for a cargo of cotton impregnated, *secundum artem*, with the plague!"—(Benth. Works, vol. v. p. 42.)

Bearing in mind that speedy justice is the great desideratum of suitors, the question naturally arises, whether some plan cannot be contrived for curtailing the multiplicity of stages at which discussions may be raised in the course of an ordinary litigation. We may at once say, that we are not prepared to concur to the full extent in the views entertained by many members of the profession relative to the Outer House. There is a large class of cases in which it is most desirable that the privilege of obtaining a rehearing should be preserved, without subjecting the parties to the hardship of an appeal to the Court of ultimate resort. Nor do we think

there can be any difficulty in distinguishing and defining those branches of litigation wherein the double jurisdiction is unnecessary. If such a classification can be made,—if litigants can be spared the annoyance and the loss of time and money incident to a system which allows appeals at every stage, and enables a defender to perplex the case with legal difficulties where the true issue relates purely to a matter of fact,—a great improvement will have been effected in our system of legal procedure. By economizing the judicial time, an indirect advantage will also be gained: the judges will have more leisure to devote to those cases that really require consideration, and arrears will be kept down. As this last consideration alone ought to be a sufficient recommendation of the contemplated change, let us pause a moment before entering into details, and glance at the consequences of that system of delay, which has so long continued to paralyse the administration of justice in Scotland.

It is not without some natural touches of remorse that we venture to illustrate this part of our subject by a reference to the sordid maxims of the political economists. Yet it is certain that the ministrations of the judicial office are just as much subject to the natural law of supply and demand, as any other class of operations affecting property and credit. The law in question, it may be necessary to remind the reader, is twofold. (1.) When any given class of operations affecting credit is free from artificial encouragement or impediment, the supply adjusts itself to the demand; and, conversely, the existence of any considerable or permanent disproportion between the demand and supply, is an indication of some artificial restriction. (2.) When restrictions on the supply have existed for any length of time, the operation of the natural law is reversed, and the *demand adapts itself to the supply*. It is only by attention to both these principles that the mischievous operation of restraints upon justice can be apprehended in their full extent.

In ordinary mercantile operations, any disturbance of the natural equilibrium, in the shape of a continual demand in excess of the means of production, is manifested in two ways. There is an immediate rise in the price of the commodity, and this is accompanied, to a greater or less extent, by delay in the execution of orders. There are countries where justice can be bought. We may instance the Ottoman Empire, and the British East Indian possessions; for it is well to be reminded that even British protection and British



administration are powerless to arrest the corruption incident to an unsettled state of society. Under such conditions of society, we may affirm that the operation of the mercantile principle in the supply of judicial ministration will be traceable in its direct and most pernicious form. But where impediments to the natural supply of justice take place in the tribunals of more civilized communities, the operation of the natural laws must be sought for in more indirect and circuitous channels. Accordingly, the annals of judicial procedure in Great Britain afford abundant evidence of the truth of the proposition, that *in proportion to the difficulty of obtaining a decision, the cost of litigation is enhanced*. When the arrears of the Court of Chancery were at a maximum, the expense of a Chancery suit was ruinous. And every practitioner in our own courts is aware that a three years' litigation costs a much larger sum of money to the client, than the same proceedings would cost if compressed into the more reasonable period of six months.

But, unquestionably, the direct and inevitable operation of the law of supply and demand on the administration of justice, is to produce *delay*,—when the supply of administration is defective or inadequate. This effect is precisely analogous to the delay that occurs in the execution of mercantile orders in consequence of restrictive legislation, or other causes of derangement in the equilibrium of trade. The resulting consequences are equally certain and unfortunate. The action of the natural law is reversed, the demand is checked, and ultimately the equilibrium is restored, but at the cost of great hardship to the consumer, and heavy pecuniary loss to those whose business it is to minister to the wants of the public.

If we have succeeded in placing before the reader, in an intelligible form, these simple deductions from the truths of Political Economy, it must now be apparent that the amount of business in arrear in our courts, at any given time, affords but a very feeble indication of the actual loss of business to the profession, or of the amount of injustice endured by the non-litigating public, who, but for the delay, would naturally seek redress through the ordinary channels of judicial decision. Let it ever be remembered, that while the fountain of justice is choked, the natural law of supply and demand remains in abeyance. Every one is aware that when labour is scarce, production must of necessity be limited. Those who can pay the highest price are first served. Those who can afford to wait come next in order. Those, again, whose necessities do not admit of delay are excluded alto-

gether, or resort to a cheaper and inferior substitute. Now, the natural substitute for legal redress is *compromise*. Place justice, cheap, speedy, and effectual, within the reach of every subject, and compromises, when made at all, will be made on fair and equal terms. But how is it with a suitor of limited means,—and, we will suppose, engaged in a business demanding all his available capital,—when he finds that the result of raising an action is to place the property or right which he claims beyond his reach for a period varying, in our courts, from two to four years ? He can raise no money on the security of property which is subject to the hazards of litigation. He cannot compel the defender to submit to arbitration ; and, accordingly, if he wants capital, or if the right in dispute is necessary to his business, or essential to his personal comfort or convenience, he is driven to make a pecuniary sacrifice,—or, in other words, to submit to injustice in order to obtain it. It is well known to the practising members of the profession that such sacrifices are frequently made, to avoid the still greater hardship that is entailed by a contest with an obstinate litigant under the dilatory procedure of our courts of law.

We are anxious, before unfolding any scheme of improvement in the practice of our courts, that no dubiety should remain in the mind of the reader, either as to the existence of the grievance or as to its true cause. In connection with the last-mentioned topic a preliminary question arises, which, however, need not occasion any difficulty, inasmuch as it admits of an exact numerical solution. Have we an adequate judicial staff, having regard to the population of Scotland, and the amount of litigation in progress ?

This may be best considered as a comparative question ; and the result of a comparison with the courts in England (in which there is no unreasonable delay) will show that the staff of the Court of Session ought to be more than adequate, were the business properly ordered and fairly distributed. Add to the fifteen judges of the English courts of law, seven Chancery judges (including three judges of the Court of Appeal, three Vice-Chancellors, and the Master of the Rolls), and we have, with the two judges of the Admiralty and Consistorial Courts, a total of *twenty-four* judges in the Superior Courts of England ; being less than double the number in the Court of Session and Exchequer. Now, according to the latest returns, the proportion between the populations of

England and Scotland is about six to one. Population being the test, it would therefore appear, that so far from our judicial staff being inadequate, it is three times greater than what is considered sufficient in the sister kingdom.

Various causes, however, have combined to render resort to litigation more frequent in Scotland, in proportion to the population, than is the case in England. The chief reasons are : (1.) that a very large proportion of the Scotch population are engaged in trades and manufactures, or other occupations giving rise to questions of disputed right ; (2.) that the law is not so well settled in Scotland as in England. The dispensation of justice with open doors dates, with us, no further back than the Revolution. The publication of the Faculty Decisions only commenced in 1752, and the great bulk of our commercial and equity law is the growth of the present century. The number of moot points in our law is very much greater than in England, where the system of public trial has subsisted nearly as long as the constitution, and where equity jurisprudence had attained a high degree of systematic perfection centuries before Lord Kames promulgated the elements of the science in a work which is still the only text-book we have on this subject.

In order that we may estimate the results that are due to the comparative immaturity of our law, and make fair allowance for the consequent encouragement to litigation, it is only necessary to compare the number of cases heard and decided in the courts of the two countries. The comparison is easily made ; but it does not afford the slightest encouragement to the notion that any addition is required to the numerical strength of the Scottish Bench. In the English courts of law there were, last year, 3309 cases set down for trial, and 531 arguments after trial. Add to these the cases heard on demurrer and in error, and the appeals from magistrates and other inferior courts, and we have an annual total of at least 4000 causes subject to adjudication by 15 judges of the English courts of law. During the same year, the 7 judges of the Court of Chancery adjudicated upon 4020 claims, besides disposing of an immense mass of non-contentious business. When we state that the number of decrees *in foro* pronounced by the Court of Session in 1859 was 1076, of which only 527 were Inner House cases (including in this number 151 litigated summary applications), it is apparent that the performance of the Court of Session is far below that of the superior

tribunals of law and equity in England.<sup>1</sup> The English judges, we believe, work harder than their Scottish compeers, yet it cannot be said that the latter do not give a fair day's attendance on their judicial duties. How does it happen, then, that the work is not done? The fault is in our system of rehearing.

Now, it is surely possible, without making any very radical change in our forms of process, to import into the Scotch system some of those elements of the English procedure which have contributed to the more speedy despatch of cases. A distinction has already been recognised in our code of procedure between jury cases and the actions not appropriated to trial by jury; and there can be no doubt that the intention of the Legislature, in transplanting jury trial into Scotland, was, that all such cases should go before a jury at once, in order that the facts and the law might be determined at the same time, reserving to the parties the privilege of a rehearing on any question of law that might arise as an exception to the judge's charge. Unfortunately, the intention of the Legislature has been defeated in consequence of our forms of process enabling the parties to raise questions of law, under the name of "relevancy," as prejudicial questions anterior to trial. It is true the Court have latterly, with a most praiseworthy determination, endeavoured to discountenance discussions on relevancy where issues are requisite; but delay is still sought, and too frequently obtained, by raising a discussion on the question, whether issues ought to be granted. Nor do we see any way of escaping from the difficulty, except by enlarging the discretion of the judge, or by establishing a classification of cases analogous to the Law and Equity jurisdiction of the English tribunals.

It is not necessary, however, for this purpose, that we should

<sup>1</sup> We subjoin an abstract of the particulars taken from the Parliamentary Return for 1859 :—

Decrees in Absence, Outer House,	.	.	.	276	
Incidental Applications, <i>Ex parte</i> ,	.	.	.	888	
					1164
Decrees <i>in foro</i> , Outer House,	.	.	.	524	
1st Division,	.	.	.	221	
2d Division,	.	.	.	155	
Incidental Applications {1st Division,	.	.	.	105	
litigated, . . . {2d Division,	.	.	.	46	
Jury Trials,	.	.	.	25	
					1076
Total,	.	.	.	2240	

—(*Accounts and Papers*, 1860, No. 23.)

enlarge the circle of cases "appropriated" to jury trial. What we desiderate is a classification of cases into those which *prima facie* involve proof, and those which involve what is properly matter of law for the determination of the Court. We would not propose to interfere with the discretion of the judge as to the manner in which the proof is to be taken; but, whether jury trial, proof on commission, or proof before the Lord Ordinary, is resorted to, we think it important—(1.) That the points to be proved should be stated in issues, or "questions of fact;" (2.) That these questions should exhaust the case, embracing both the law and the facts; and (3.) That, after proof has been taken, there should be only one hearing of the parties on the entire case, unless in the event of the Court being equally divided, or of their Lordships considering the question of sufficient importance to be laid before the whole Court. As a necessary adjunct to these main features, we would propose absolutely to prohibit reclaiming notes on questions of relevancy; at the same time, empowering the Lord Ordinary to direct such additional statements of fact to be added to the record as may be necessary to furnish a proper foundation for the issues desired by either party.

It is, of course, an easy task to raise objections to any scheme that may be devised for improving the procedure of our courts; and we are quite prepared to learn that a majority of those who are so far interested in the subject as to peruse our remarks with attention, and who have doubtless already discovered a "more excellent way," regard our proposals as the results of a well-meaning but misdirected zeal. To all such objectors we beg to convey the assurance, that they have entirely mistaken the aim and object of our inquiries. We merely wish to show that improvements are practicable without entirely revolutionizing the forms of procedure; and the possibility of effecting improvements can never be better displayed than by explaining the manner in which it is proposed they should be carried out. The consideration that there are twenty other modes of reforming the practice of the Court, is not an obstacle against us, but an argument in our favour. The particular method employed is a matter of very secondary importance; but it is of some consequence to be able to prove that there are methods by which the labours of the judges may be lightened, and the delay which is incident to our existing procedure avoided.

Such being our object, a very brief explanation may suffice regarding the nature of those alterations in the technical forms of

procedure which would be requisite in order to give effect to the principles already enunciated. It is not necessary for that purpose that any change should be made in the structure of the record, or the procedure incidental to its completion. Up to this stage of the journey, the lawyer may be said to steer by chart ; but, when the record is closed, he is fairly at sea. There is, however, one exception. If the case belongs to the class of Appropriated Actions, the order is uniformly to close the record and allow issues to be lodged. Objections to the relevancy can only be raised on the adjustment of issues,—a rule which ensures the debate being carried at once to the Inner House, where the case is either forthwith prepared for trial, or the action is stopped by a decree of absolvitor. But, if the action is not one which positive law or uniform custom has fixed as appropriate to jury trial, the order most usually taken is “close and debate.” Not till the case has been hung up three, or even six, months in the Debate Rolls, does the Lord Ordinary discover that there is nothing to debate about, or (which is still more unfortunate for the parties) that there is, *at any rate, a part of the case* which cannot be decided without a trial of fact. Let us take an illustration. On the 6th of June 1860, a reclaiming note was put out for hearing by the First Division, in an action of damages directed against a well-known and much respected member of the legal profession in Edinburgh. Counsel had not spoken three minutes, when it was suggested from the Bench that the interlocutor could not be supported, because, while allowing issues to be lodged on one branch of the case, it reserved certain other conclusions for after-consideration. Counsel were agreed as to the impropriety of the course which had been taken, but some doubts were raised as to the terms of the interlocutor which ought to be pronounced. The difficulty, however, was at once removed by the discovery of a precedent, in the shape of an interlocutor pronounced in the same case by the same Division exactly twelve months before. Was it the fault of their Lordships that two premature appeals had been taken, and two years consumed in endeavouring to induce the Lord Ordinary to apply his mind to the whole facts of the case ? Clearly not. Accordingly an interlocutor was pronounced, recalling that of the Lord Ordinary, and directing that parties should be heard, with a view to the ascertainment of the facts on the whole case. This case illustrates very forcibly the complete anarchy which prevails with reference to the

order and method of procedure in cases not specially appropriated to jury trial.

Another case of recent occurrence may be referred to as an example of the utter laxity of practice with regard to the ascertainment of facts. The question involved was mainly a matter of law relating to the designation of a glebe; and the Court were about to give judgment, on the assumption that certain facts stated on record were admitted by both parties. This turned out to be a mistake, and the advising had to be delayed until the parties should ascertain by inquiry whether the facts in question could be admitted. It is easy to say that parties should come prepared either to admit or deny allegations. But when it is remembered that the order to "close and debate" is too generally pronounced as a matter of course, without the slightest reference to the facts of the case, it is not surprising that the parties, after spending two years in a paper war over the record, should be unwilling to acknowledge that all their efforts have been thrown away, and to ask for that which should have been the next step after closing the record, an order for proof. It is because proof is not asked for at the proper stage, that cases are so often laid before the Court without the materials essential to a satisfactory decision.

What we desiderate, therefore, is, first of all, the establishment of an imperative rule, that the facts must be ascertained before the Court is required to apply the law. It should be the duty of the Lord Ordinary, when the record is closed, to call upon counsel to state whether either of the parties desires a proof of his averments. If no proof is demanded, he should be required to pronounce an interlocutor finding that the parties have renounced probation. If otherwise, then we would propose that the Lord Ordinary should then and there determine in what manner probation is to be taken, and allow the parties to give in issues, or questions of fact, exhaustive of the grounds of action and defence, and in such terms as they may think appropriate. We think also that the Lord Ordinary should have power to adjust the terms of these issues or questions, and that his decision should be final, unless leave were given to reclaim for reasons to be stated in the interlocutor, or unless the interlocutor was one refusing an issue altogether on the ground of irrelevancy. As regards jury causes, the adoption of this system would, in nine cases out of ten, ensure the possibility of having the trial brought on in the same session in which the cause comes into

Court. Questions of law would continue to be raised on bills of exceptions or motions for new trial as heretofore, and would be disposed of not later than the following session. In the event of the judges of the Inner House being of opinion that a new trial is necessary, they should have the power of directing new issues to be tried, in the same manner as that power is at present exercised by the House of Lords.

This brings us to the question, whether there is any reason for continuing the system of a double hearing where the facts are ascertained otherwise than by jury trial? Practically, there are but two other modes of deciding the facts: viz., by proof on commission, and by trial before the Lord Ordinary. The provision of the Act of 1850, by which proof on commission is prohibited except of consent or on report to the Inner House, appears to have been introduced for the purpose of discouraging this mode of taking proof; but it is remarkable that, although various new modes are provided by this Act, no attempt has been made to simplify the procedure where a proof on commission is allowed. Now, this Act expressly recognises the inexpediency of allowing rehearings on the evidence; *e.g.*, the provisions for trial by arbitrators exclude all review except on questions of law stated at the trial; and, where the trial is before the Lord Ordinary without a jury, there is to be no appeal on the evidence other than a rehearing before himself—a provision which, as might have been expected, leads to no practical result. We would propose, therefore, as far as possible to assimilate the practice where proof is taken on commission to that which obtains in trials before the Lord Ordinary. With this object in view, the privilege of a rehearing before the Lord Ordinary, on his own notes of the evidence, should be taken away; and, with regard to proofs on commission, we would propose that the proof should be confined to specific questions of fact, adjusted as already explained; that the proof should be taken as far as possible continuously, and should either be discussed before the Lord Ordinary on the footing that his decision is to be final, or (as we would prefer) it should, without going before the Lord Ordinary, be at once printed and reported to the Inner House, thereby saving the expense and delay occasioned by the present system of double hearing. Whatever advantage may be derived by the Court from the consideration bestowed by the Lord Ordinary on questions of law, they can derive none whatever from his investigation of *evidence not taken*



*before himself.* On the contrary, it is admitted to be the duty of each of the judges to read and consider the proof for himself; and, as parties will not be content with the conclusions of a single mind, it is much better that they should be enabled without delay to lay the evidence before a full Bench.

In the preceding suggestions our object has been twofold: (1.) To assimilate the procedure in all actions depending on proof as much as possible to jury trial, so that there shall be only one hearing on the whole case, embracing both the law and the facts; and (2.) To stop or discourage reclaiming notes at all stages of the cause anterior to the ascertainment of the facts. One great cause of premature reclaiming notes has still to be noticed. The existing rule as to the finality of interlocutors in the Outer House is an anomaly, and an anomaly productive of serious inconvenience. It is not so in the Sheriff Courts: it is not so in appeals to the House of Lords. From the petty sessions to the Court of ultimate jurisdiction there is but one exception to the rule, that an appeal against one interlocutor carries with it the privilege of bringing all prior interlocutors under review. That exception occurs in reclaiming from the Lord Ordinary's Court to the Divisions; the rule being absolute, that a Lord Ordinary's interlocutor is final *unless* the case be immediately removed to the Inner House. The effect of the rule, as our readers must be aware, is not to secure finality, but simply to compel the parties to reclaim against all interlocutors *seriatim*, at an infinite cost of time, labour, and judicial attention. Now that the decrees of Sheriffs have been co-ordinated with those of the Lords Ordinary as respects the liability to review in the Inner House, the maintenance of the distinction as regards time, is perfectly indefensible. It is injurious to the metropolitan profession, because it gives to the suitor in the Sheriff Courts an advantage not possessed by them, who take the initiative in the Court of Session. Actions of the greatest magnitude may be begun and prosecuted to a conclusion before the Sheriff-substitute without interruption; and after a formal appeal has been taken to the Sheriff, the whole case may be brought up, and a review obtained by the Inner House, and ultimately by the House of Lords, on every interlocutor of importance; while in the Court of Session the unfortunate litigant is tortured by the necessity of reclaiming against every *separate* interlocutor, involving at each stage the preparation of a new pleading, printing, enrolment, appearance by counsel on the Single Bills,

indefinite adjournment, and ultimately an argument on the merits, and an advising.

We believe there is but one opinion amongst the profession as to the impolicy and inconvenience of this system. Our own opinion is favourable to the introduction of a clause on the model of the 25th section of the Sheriff Court Act, prohibiting review except in the case of interlocutors sisting process, decerning for interim payment, or disposing of the whole merits of the cause, and reserving the right of bringing prior interlocutors under review along with the merits. But, apart from the expediency of depriving parties of their right to obtain an immediate review, we would still urge the propriety of at least allowing the parties to exercise the option of refraining from claiming a review until the merits have been decided,—a claim which, under the present system, is too frequently advanced without the slightest benefit to either party, and very much against the inclination of both.

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#### THE PHILOSOPHY OF LAW MAXIMS.

##### IV.—BONA FIDES.

IN the first number of these discussions, we expressed our intention of dealing with those legal maxims which have a common application in the Roman law and in the law of Scotland; and we proposed to confine our attention, in the first place, to the subject of obligations. In pursuance of that object, we have already commented on the doctrine of possession as a question of fact entering largely into the ordinary relations of life; and, in the last two papers of the series, we were occupied with the illustration of a general principle, which operates in the two systems with strikingly similar results. As a further step in the same direction, we come now to consider the important branch of law comprehended under the title of *Bona Fides*. Numerous as are the points of contact which have appeared in the ground we have already travelled over, they range themselves in this department in a still clearer and stronger aspect. It is the paramount assertion in the Roman jurisprudence of the principle of justice that invests it with an indestructible power, and renders its provisions suitable for all classes and all conditions of society. The same consolidation, in our own, of equitable rules with the positive elements of law, justifies the reputation which it has long enjoyed

among modern systems, and recalls more strongly than any other of its features, the source from which it has principally sprung.

The subject of *bona fides* may be regarded from many points of view. It suggests, for example, a speculative inquiry in connection with the circumstance that the region of morals here encroaches somewhat largely, and not altogether in harmony with the strict theory of its constitution, upon the sphere of law. Or it might be considered in its historical bearings, from its first rude application in the early Roman system, onwards through the impetus it received from the equitable *beneficia* of the Prætor, till its final incorporation with the statute-books of Justinian. Or, in a still more practical aspect, it might not be uninteresting to trace its own separate conclusions on the basis of the isolation which is sometimes held between it and the positive law. But, apart from the circumstance that our subject is bounded by precise limits which we may not safely overstep, none of these points of view are likely to establish anything beyond the vaguest speculative results. Whatever objections may be raised against the treatment of *bona fides* as an element of law, it is impossible to ignore the fact that it was thus regarded by the ancients, and that its authority in modern practice rests upon a foundation not less extensive than secure. We are prepared, therefore, in spite of all theoretic contradictions, to give full effect to a principle which, in addition to its own internal evidence, bears with it such strong traditional significance. And leaving, for the present, all doubt, and speculation, and scrutiny aside, we shall continue, as in dealing with less uncertain subjects, to record common points of agreement in the two systems as common positive results.

The general bearing of *bona fides* on the system of law is expressed in the maxim:—

“*Bonæ fidei non convenit de apicibus juris disputare.*”

It is not consistent with good faith to insist on extreme subtleties of law.

Obvious as the construction of this rule is, it is yet important that the precise limits of its application should be carefully defined. Like many moral propositions which affirm a remedy for an acknowledged evil, the popular appreciation of it is too apt to be carried beyond the measure in which it was intended to apply. It does not contemplate, as from a superficial view it might be held, to establish an opposition between law and justice, exalting the one

for its clear equitable action, while censuring the other on the ground of its possible defects. It does not contemplate, in other words, to raise a contrast between the popular view of justice as an expression of blunt common sense, and the scientific view of law as a system of pure logical results. It only says that legal arguments are not to receive all the extension which they may be able to bear; that subtlety, merely as such, is not to receive effect when the ends of justice are to be promoted, and the presence of the one is inconsistent with the execution of the other. The utility of law as a science, and the necessity of developing its legitimate conclusions, are fully reserved in the statement of the rule, and all intellectual refinement is not ignored because the sophistry of the casuist is condemned.

The Roman jurist, after asserting the principle that law, in aiming at the common good, must embrace much that does not receive support from technical rules of reasoning, proceeds to illustrate the rule from the provisions of the *Lex Aquilia*. Among other things, that law enacted, that if several persons united in stealing a neighbour's beam, which they were, individually, unable to carry off, they were to be held liable as if every one had committed the offence wholly for himself (Dig. ix. 2-51). In strict language, it might be held that no one had been guilty of the theft, since the act charged was to each, considered singly, physically impossible. But it was, nevertheless, true that the wrong done, though not a theft in the scholastic sense of the term, was still a theft in all its tangible results; and since its comprehension within the definition of the technical offence did no further violence than to offend a somewhat subtle use of language, the law resolved, in the interests of justice, that it should be regarded as practically the same. So it was in civil law. If a debtor received from his creditor a power of sale—as, for example, of an article of hypothec or pledge—an alienation of the subject by the debtor's heir was held valid, and sustained. In particular cases it might well be made a question, within what limits the creditor intended the exercise of the right; but the law, considering that such inquiries could only tend to promote subtlety in argument, established the general principle that the sale, once effected, could not be impugned.

There is little need for illustration of the rule in reference to the law of Scotland. Nations, like individuals, in the first exercise of intellectual freedom, may sometimes err in exalting the instrument

over the practical purposes which it is intended to subserve. In modern life, this is, unhappily, still the experience of many European states; and, in some cases, national peculiarities are tending to aggravate the natural effect. But our law has been matured through many peaceful ages, and is the production of a people too long accustomed to the liberty of thought and action to be dazzled by the glitter of speculation into a disregard of the rights of justice and the blessings of social order. And it is conspicuous not only in comparison with systems where these ends are but imperfectly developed, but takes precedence over those in which they have long been the objects of familiar practice. A happy form of administration has contributed largely to this result. In Scotland, in favourable contrast with the rule in England, the association of law and equity has tended, among other practical benefits, to maintain the independence and the authority of judges—a fact, the history of which, in circumstances less propitious than our own, might have been the record of injustice and oppression, but which has, actually, been productive of the happiest results. Our law has thus been carried to its present excellence, not only by the efforts of prudent legislation, but assisted and improved at every stage in the very process of administration. And so the rule we are considering is true of it in a double sense—true of the laws which are positively fixed, and of the machinery through which they are carried into practical effect.

In the contrast, however, between the Civil law and the law of Scotland, an important limit must be observed in the application of the rule. With the exception of a few imperial ordinances, the Romans possessed but little written law previous to the legislation of Justinian. They were thus exempted from the conflict which must always, to a greater or less extent, subsist between the fixed and the variable elements of law; and, therefore, the principle of the rule might be asserted not less of the whole compass of their system than of every period of its history. But with us, from the earliest times, a statutory law has been growing up by the side of the customary law; and neither the most watchful care in preparation, nor the widest judicial licence in the matter of construction, have been able to repress a certain attitude of hostility which has always reigned between the two. The unformal character of the one naturally tends to the promotion of equity. Statutes, on the other hand, drawing after them, in many cases, a strict interpreta-

tion, and regardless by their very constitution, of the qualifications introduced by circumstances, do not always operate towards the assertion of right. Where they are imperative, and provision is not made, by special enactment, to meet the case of exceptions, their enforcement may sometimes be accompanied by a particular form of that subtlety which is deprecated in the rule. The famous bond case of *Thomson v. M<sup>r</sup> Crummon's Trs.*, 1st Feb. 1856, verifies the restriction we have imposed upon the action of the rule; the direct legislative interference,<sup>1</sup> on the other hand, which the palpable injustice of that case suggested, is a testimony to the sympathy which subsists between its principle and the genius of our law.

Having thus illustrated the general bearings of equity upon our law, we shall not stop to consider the maxim, "*In omnibus quidem maxime tamen in jure æquitas spectanda sit*"—Regard is to be had to equity in all things, but especially in law. We pass on to the rule:—

"*Non capitur qui jus publicum sequitur.*"

He is not overreached who acts according to the public law.

In a certain general sense of the term Fraud, this rule might have been included in our previous discussions upon that subject. Strictly interpreted, however, it falls more properly to be considered under the doctrine of *bona fides*. It makes reference, in an indirect form, to a class of transactions against which relief is accorded by law, not so much on the principle that positive dishonesty constitutes their inducing cause, as because they fail in some of the conditions of equitable dealing. Against the consequences of fraud, legal protection will be extended to all, without respect of age or person; only minors, in some cases, women, and others labouring under certain incapacities, are entitled to plead the want of that sufficient understanding which the law assumes as present in the ordinary transactions of men.

The contrast suggested in the rule between the private and the public law has special reference to the case of minors, who may be relieved from the effects of lesion in the one sphere, but occupy the same position as others in estimation of the latter. Public law being constructed on a general consideration of what is fair and

<sup>1</sup> 19 and 20 Vict., c. 89, An Act "to abolish certain unnecessary forms in the framing of deeds in Scotland."

just for all, no one is understood to suffer loss from its operation, and no provision exists for particular cases in which such loss may be alleged. Private law, on the other hand, though not deficient in rules and principles of general application, is necessarily indeterminate in action, and deals with special circumstances by the very terms of its constitution. It is, therefore, subject to all the modifications which public policy may impose in view of the various relations of life, and in satisfaction of the claims of justice. Among such modifications may be classed the privileges accorded to minors by the Roman law, and continued in our own, at once in the same spirit of indulgence, and to the same extent.<sup>1</sup>

Both systems, however, agree in recognising the restriction which is indicated by the rule. In the Roman law, when a minor sued cautioners who had undertaken the responsibility of a debt in *solidum*, the first step of procedure was an allocation by the *jus publicum* of a *pro rata* share on each. Then each was liable only for the amount decreed against him; and the assertion of the rule is verified in the circumstance, that the minor was not entitled, on the supervening bankruptcy of one cautioner, to recommence proceedings with the view of saddling on the others the share of the defaulter (Dig. 46—1—51). As to the law of Scotland, on the other hand, a suitable illustration is found in the doctrine, held by all our institutional writers, that while a minor may obtain relief against injurious provisions in a marriage-contract, he is so far on a footing of equality with others, that against the marriage itself he cannot be restored (Bell's Pr., sec. 2088). An apparent, and but an apparent exception to the rule, is the principle of our law, that even the authority of the Court granted to curators for the alienation of a minor's heritage will not exclude the latter from his claim to restitution on the ground of lesion. The permission given by the Court is, undoubtedly, a deliberate judicial act; and it may be argued, that judicial acts are either equal in their operation, or they are exceptional only in conflict with the theory of the rule. To this it may be answered, in the first place, that, though contrary to the usual practice, legal judgments are, in point of fact, reviewed by the

<sup>1</sup> This use of the terms, private and public law, although, perhaps, philosophically inaccurate, is in strict accordance with general practice. By the former we understand the system of rules established by the State for regulating the transactions into which men may enter with one another; the latter denotes the medium through which these rules are carried into effect.

Courts pronouncing them, without any sacrifice of principle. Then, secondly, there is the consideration, that the sanction of the Court, when granted (for this exercise of the *nobile officium* is notoriously rare in practice), proceeds avowedly on *prima facie* grounds alone; thereby guarding, on the one hand, against the responsibility which attaches to such a grave transaction, yet reserving, on the other, at once the minor's right of action and a power of final judgment.

Leaving the class of general maxims, which we have hitherto illustrated, to consider those which suggest more special points in law, we find the rule, "*Bona fide possessor facit fructus consumptos suos*"—"One who possesses in good faith is not liable to account for fruits that have been consumed." It falls, however, within the terms of our plan to deal with legal maxims in the strict sense of the term only, not with mere definitions and stereotyped statements of familiar principles. Important, therefore, as this proposition is, as opening up a wide and varied prospect, and interesting, above all others, as expressing the first historical development of the action of *bona fides* in the sphere of law, its discussion obviously does not belong to the limits of our present subject. We pass on to a rule of great practical significance, and one which literally accords with the definition of a "rule of law:"—

"*Bona fides non patitur ut idem bis exigatur.*"

Good faith does not allow the same claim to be twice enforced.

A certain *prima facie* view of this rule would lead us, not unnaturally, to attach a meaning to it which it is not intended to bear. Looking at *bona fides* in the popular sense, as implying a direct opposition between what exists as law and what is taught by equity, it might be held to signify that the authority of the one is lent to enforce claims to which the other will not give its sanction. But, while it is certainly true that such is, in many cases, the action of law and equity, it would be very erroneous to assume, either generally, or in the subject of our present treatment, that these two elements always stand to each other in a relation of pure contrast. We shall have occasion, immediately, to furnish many practical proofs to the contrary. At present, we remark, on the construction of the rule, that it suggests no antithesis between *bona fides* and the *strictum jus*. It holds good in the Roman jurisprudence, not less truly than in our own; and it is notorious that this distinction had passed away long before the legislation of Justinian, and has never



been revived at any period in the history of our system. The comparison is not so much between principles as between circumstances,—between cases which take the ordinary course of law, and those in which the presence of certain elements qualifies its normal operation. *Bona fides*, therefore, must be assumed as entering not less into the subject than the predicate of the rule. Strictly interpreted, the proposition, that good faith will not allow the same claim to be twice enforced, is false in point of law, or it fails at any rate to represent the exact conditions under which that effect is produced. *Bona fides* not only does not always prevent the double satisfaction of one debt; but, in some cases, it purposely demands it. It does so when a party claiming the benefit of the equitable exemption is not able to instruct, by fair and honest dealing, that he has himself respected the authority whose protection he solicits.

The Pandects abound with examples testifying to the wide application of the rule in almost every branch of law. Among these we note the following:—

1. A master who acted fraudulently with reference to the *peculium* of his slave, as by squandering or applying it to improper purposes, having made due reparation for the wrong, was not liable, on the same ground, to any other party. And if the slave was indebted to him in an amount equal to what he sustained in the way of loss, judgment was not given against the master (Dig. 15—1—26).

2. A debtor, the seller of an estate, for example, who refused to give effect to a *missio in possessionem* granted in favour of his creditor, but at the same time substantially made good his obligation in another form, was, on the principle of *bona fides*, exempted from being sued a second time on the technical ground of the *missio* (Dig. 42—1—51).

3. A legatee was not entitled to demand from the heir both the value and the *ipsum corpus* of a legacy left to him by the testator (Dig. 43—5—3, sec. 15).

4. If extrajudicial payment of a legacy was made to the procurator of a deceased person, a stipulation was taken to the effect that the heir would hold the payment valid. By this means the party paying secured himself against any further liability at the instance of the heir (Dig. 46—8—21, sec. 6).

Turning to the law of Scotland, proof of the rule meets us at every turn. And if we take the ground of obligations in its largest

sense, as including the *dare*, *facere*, and *præstare* of the Roman law, the sources from which illustrations may be derived are not only numerous but varied. But we shall not do more at present than trace the action of the rule in a single doctrine which has reached the highest compass in practical importance, and yields to none other in point of theoretical distinctness. Examples might, indeed, be given of individual cases, where the rule has been applied to a certain chain of circumstances without reference to any special branch of law; and no better testimony to its authority exists than the books of our decisions. Lord Stair mentions a case of this sort (*Ramsay v. Robertson*, Jan. 10, 1673), where it was held that an executor-creditor having, before sentence, obtained payment from the debtor's heir, was not entitled to pursue upon his confirmation. A similar one, in which the principle of the rule is happily illustrated, is the later case of *Haggart v. Miller*, May 29, 1838; 16 S. 1058. Our limits, however, will not allow of our dwelling on mere questions of detail; we pass on to a short statement of the subject to which we have referred—the doctrine of *bona fide* payment.

Payment of a debt to a person who has an ostensible but not a preferable claim is, shortly stated, the circumstance upon which this doctrine is based. Payment to the true creditor, or to his heir with titles made up, or to an agent or factor acting in his name, do not in any way involve the principle, and would, therefore, be improperly adduced as illustrations of the rule. It can never be made a question in these cases, whether *bona fides* has been present or not, since the relation is constituted between two persons only, and the act of payment necessarily renders the transaction complete. It follows that no second claim can arise in the sense in which such claims are here spoken of; for *prima facie* grounds, at least, are necessary to their being entertained, and these are manifestly wanting. To bring *bona fides* into play, three parties must be engaged,—one bound to performance, a second entitled to receive, a third retaining the semblance of claims once actually possessed. The colourable title is, for the time being, and in relation to the debtor, substantially changed into a real one, and the action of *bona fides* consists in securing for this result the validity and permanence of law. In what proportion it is referable to justifiable ignorance on the side of the debtor, or to culpable negligence on the part of the creditor, are questions of detail into which we do not

profess to enter. Among cases in the law of Scotland where this effect is produced, we note the following:—

(1.) A debtor is secure in paying to the creditor with whom he contracted, in disregard of any and every sort of diligence of which he has received no intimation. Private knowledge, *as a general rule*, is not an element which *per se* induces liability. It is, undoubtedly, altogether inconsistent with the idea of *bona fide* payment; but it is difficult of proof, and the law, while not ignoring it, properly requires that, when collusion is alleged, it shall be manifested by an overt act.

(2.) The policy of the common law is sanctioned by the statutory provision, that a debtor is safe who pays in ignorance of the insolvency of his creditor.

(3.) Tenants may pay to their landlords in all cases where a preferable right has not been constituted by possession, or by some positive act held in law as an equivalent. Whatever be the cause, whether it is a remnant of the strict family ties of the feudal system, always jealous of the presence of strangers, or, as is perhaps more probable, it arises naturally from the comparative rarity of such transactions, it is certain that greater scope is allowed in this relation for the action of *bona fides*, than in the previous cases to which we have referred. Even intimation of a heritable bond granted by the landlord will not, of itself, be sufficient to render a tenant, paying in contempt of it, liable in a second claim (Bell's Prins., sec. 561. See another form of this licence illustrated in the case *Sommerville v. Smith*, Nov. 21, 1823, 2 S. 509).

(4.) Another instance of statutory corroboration of the common law occurs in the rule that *bona fide* payment to a creditor by a debtor abroad, whose funds have been arrested, but who has had no personal notice, is valid to defend against a second charge,—a principle which has undergone a further extension in being applied to debtors paying at a distance, in ignorance of diligence used at home, and is firmly fixed in practice (*Leslie v. Lady Ashburton*, Nov. 29, 1827, 6 S. 165). The existing rule, which is intended to meet the case of edictal service, is contained in the Bankruptcy and Judicial Procedure Act (19 and 20 Vict., c. 91). It is well worthy of consideration, whether an extension of the rule to all cases of edictal citation combined with the requirement of *ex parte* proof might not form an advantageous substitute for our present anomalous procedure relative to decrees in absence.

W. A. B.

## TITLES TO LAND ACT, 1860.

CONSIDERING the leisurely pace at which legislation now proceeds, it is perhaps matter for congratulation rather than otherwise, that it has only taken two years to extend the provisions of the great conveyancing statute of 1858 to lands held by burgage tenure. The Act (23 and 24 Vict., c. 143) by which this has been effected is not limited to that purpose only, but also introduces several amendments of the former Act (21 and 22 Vict., c. 76). We propose to consider very shortly the various sections of the new Act, both those relating to lands held by burgage tenure and those affecting lands held feu. In regard to the former, we shall not repeat the commentary we made on the corresponding sections of the Act of 1858, but refer our readers for it to Vol. II., pp. 487, 526, and 568 of this Journal.

*Section I.* gives the short title of the Act.

*Section II.* is the Interpretation Clause. In commenting on the former Act (Vol. II., p. 489), we took occasion to remark on the inconvenience, and even risk of error arising from the postponement of the "interpretation of terms" to the end of that statute. We are glad to observe that this has been obviated in the new Act. The section itself does not differ in any material respect from that in the 21 and 22 Vict., with these exceptions, that it omits the definition of "instrument" and "notarial instrument" contained in the former Act, while it provides that "the words, 'by burgage tenure,' and the words, 'held burgage,' shall extend to and include any mode of tenure known and effectual in law similar to burgage tenure." The omission does not call for any remark; but we are somewhat at a loss to understand what is meant by the new provision. It cannot well be meant to meet the case of the Booking Tenure of Paisley, for that is specially provided for by section 23. What other tenures there are similar to the burgage tenure, we do not know; and if the framer of the Act knew of such, it would have been far better to have specified them than to have opened the door for argument and litigation as to the meaning of the clause.

*Section III.* This section renders it unnecessary to expedite and record instruments of sasine, or of resignation and sasine, on any conveyance of lands held burgage, and provides that infestment may be taken by recording the conveyance itself along with a warrant for its registration signed by the grantee or his agent. There

is no express limitation as to the period within which a conveyance may be registered, but it is implied that it must be presented for registration within the lifetime of the grantee, because the warrant must be signed by him or his agent (see sec. 13). Under sections 9 and 10, however, if the conveyance has been assigned before being recorded, it may be recorded any time during the life of the assignee; and the same will hold in the case of an adjudger, heir or other person who has connected himself with the recorded conveyance in the manner pointed out by the Act. As conveyances will be preferable according to the dates at which they are recorded, it will be the duty of practitioners to see that they are registered as soon as possible after execution. It should further be observed, that those only in whose favour the warrant for registration is granted can take benefit by it; as to all others interested, the right conveyed will remain personal and incomplete.

*Sections IV. and V.* These sections provide that it shall not be necessary to record a conveyance of burgage subjects at full length, but that any grantee under it may complete his title upon it by expediting a notarial instrument in his favour, containing those portions of the conveyance which relate to his interest only. It is also provided that the granter of the conveyance may insert a clause of direction, specifying the portions of it which he desires to have recorded. These sections are nearly identical in language to the corresponding ones in the Act of 1858. It must, however, be observed, that the "clause of direction" must be referred to in the warrant of registration which is indorsed on the conveyance. Without this trifling provision being complied with, it would seem that no valid effect can be given to a clause of directions in a deed.

*Section VI.* By this section it is enacted that it shall no longer be necessary to insert in conveyances of burgage subjects a clause of obligation to infeft, or a procuratory of registration. It may be a question whether these would be held as implied from the mere fact of granting the conveyance; and, if not, it may be incompetent to complete a title to lands held burgage after the old method on a conveyance in the new form. The question is not, however, of much practical importance, or of likely occurrence. It is hardly necessary to observe that, in a conveyance of burgage subjects, the holding is always *a me de superiore meo*, subinfeudation being forbidden.

*Section VII.* Prior to the present Act, heirs to burgage subjects were cognosced and entered by the bailies, an instrument of cogni-

tion and sasine being expedited by the town-clerk, who had the exclusive privilege of acting as notary public within burgh. Neither the Service of Heirs Act (10 and 11 Vict., c. 47), nor the Infestment Act (8 and 9 Vict., c. 35), materially interfered with service and entry *more burgh*. The present Act provides two modes for the heir in burgh making up his title. He may either obtain a writ of *clare constat* from the magistrates, or he may obtain decree of special service by the Sheriff of Chancery, or by the Sheriff of the county within which the burgh is situated. It would appear that it was formerly competent for the magistrates to enter the heirs of burgesses by precept of *clare constat* (Lockhart v. Kennedy, July 1662; 1 Brown Sup. 482); but, as Professor Menzies (Lectures, p. 797) remarks, this mode of entry was not observed in practice. It would also appear that, to a limited extent, it was formerly competent, and even the practice, for magistrates to enter heirs by decree of special service. Now, however, it is provided that the special service may proceed before the Sheriff of Chancery or the Sheriff of the county; and in all probability this will become the ordinary mode of completing a title as heir to burgage subjects. The writ of *clare constat*, or the decree of special service, being recorded in the appropriate register along with the warrant for its registration, signed by the heir or his agent, is to have the same effect as if the heir had been cognosced and entered by the bailies, and an instrument of cognition and sasine in his favour had been duly expedited and recorded. Such writs and decrees, of course, can only be applied for by the heir of the person last vest and seised in the subjects. Where the ancestor was not infest, or the conveyance in his favour was unrecorded, the heir must make up his title by general service, so as to take up the unexecuted procuratory or unrecorded conveyance. But in this case it will be necessary to expedite a notarial instrument under section 10.

*Section VIII.* This section is designed to enable a general disponee to burgage subjects to make up his title without the necessity of resorting to the tedious and expensive process of an action of adjudication in implement. It is identical, *mutatis mutandis*, with section 12 of the Act of 1858; and the only observation we think it necessary to make in regard to it is, that, as the ambiguity of that section has not been remedied, practitioners would do well to take the annexed schedule (E) for their guide, rather than the section

itself, if they would avoid the fatal blunder of omitting to connect the title of the general disponee with the real right held by the grantor of the general conveyance.

*Sections IX. and X.* extend to burgage subjects the provisions of sections 13 and 14 of the Act of 1858, as to the transmission of unrecorded conveyances.

*Sections XI. and XII.* These sections provide for what we should not imagine to be a very frequent case,—the entail of lands held burgage. The one section provides that the tailzied destination may be referred to instead of being repeated in the titles by progress; and the other enacts that an express clause of registration in an entail shall have the effect of the ordinary clauses prohibitory, irritant, and resolutive; which, therefore, need not be inserted.

*Section XIII.* Though not very clearly worded, the intention of this section seems to be, that all conveyances (with warrants of registration written thereon), instruments of cognition, etc., may be registered at any time during the lifetime of the person who, by himself or his agent, signs the warrant. It matters not that the grantee is dead, provided the person in right of the deed and signing the warrant for its registration is alive. The date of entry in the minute-book is to be held the date of registration, and extracts of all deeds registered under the authority of this Act shall be as good as the deeds themselves, except in actions of reduction-improbation.

*Section XIV.* This section provides that the forms of conveyancing in use prior to the passing of the Act may still be used.

*Section XV.* This section gives trustees on sequestrated estates, and liquidators, official or voluntary, the same facilities for making up their titles to burgage property which the 22d section of the Act of 1858 gave them as to subjects held feu.

*Section XVI.* The old cumbrous forms of diligence against apparent heirs to burgage property are dispensed with by this section, and the improved forms introduced by the Act of 1858 (sec. 27) are extended to all heritable property. This is the carrying out of a real reform, affecting no one injuriously, except a few members of the junior bar, whose "decrees in absence" have been, and will continue to be, largely diminished by it.

*Sections XVII. and XVIII.* The former of these sections extends to lands held burgage the provisions of the Act of 1858 (sec. 29),

as to the insertion of burdens, conditions, etc., in instruments of cognition or other notarial instruments; while the latter does the same as to the provisions of section 31 in regard to the recording of new blundered conveyances for notarial instruments registered under this Act.

*Section XIX.* While this section extends the provisions of the Erasure Act (6 and 7 Will. IV., c. 33) to instruments of cognition and notarial instruments expedite under the present Act, and to notarial instruments expedite or to be expedite under the Heritable Securities Act of 1845 (8 and 9 Vict., c. 31), it is worthy of remark that it does not extend them to instruments expedite under the Burghage Titles Act (10 and 11 Vict., c. 49).

*Section XX.* This section repeats *verbatim* the provisions of the 34th section of the Act of 1858 as to tested deeds partly written and partly printed or engrossed.

*Sections XXI. and XXII.* It is clear that the present Act will have a very material effect on the emoluments of town-clerks; for with the instruments of sasine will go the monopoly which these officials had in expediting them. Those appointed subsequent to 8th March 1860, it is declared, shall have no exclusive right or privilege of preparing any writ applicable to land, or any claim for compensation in consequence of the loss of the emoluments hitherto derived by their predecessors from that source. Of course they will still be entitled to the fees of recording writs in the burgh registers of sasine, which are not affected by the Act. Those holding office before 8th March 1860, are declared entitled to claim the fees for preparing and recording the conveyances, or other writs, which, when recorded, will operate the effect of a recorded instrument of sasine, or of sasine and resignation, provided that in estimating these fees the instruments of sasine, or of sasine and resignation, shall not be computed as of greater length than the writings actually recorded. These provisions relate to the case where a burgh register of sasines has been kept; where such has not been kept, the existing town-clerks are to get one-half of the fees they would have been entitled to draw for the preparation of the writs or instruments which have been rendered unnecessary by this Act. In order to prevent them from being cheated out of their dues, it is enacted that no conveyance or other writ coming in place of any writ or instrument, which the town-clerks would formerly have been exclusively entitled to prepare,



shall be validly recorded, unless the warrant of registration (if any) or the conveyance itself shall be subscribed or endorsed by the town-clerk. If the conveyance is prepared by them, they are not entitled, in respect of signing it, to claim any other fees than those for its preparation. The town-clerks of burghs, where no burgh register of sasines is kept, who may be appointed after 8th March 1860, will have no exclusive right of preparing any conveyance, or other writ whatsoever, nor any claim for compensation for the loss of the emoluments thence derived by their predecessors. This latter provision affects all town-clerks appointed subsequent to the specified date, and it is to be observed that the present Act does what it has been matter of complaint against former Acts that they neglected to do, viz.,—it declares that there shall be no claim for compensation in respect of “alterations affecting the rights, duties, or emoluments of town-clerks which may be made by this Act, or any Act which may hereafter be passed.” All new town-clerks, therefore, must take office subject to this proviso.<sup>1</sup> We do not consider it necessary to discuss here what was keenly canvassed during the progress of the present measure—the policy of diminishing the emoluments of those important municipal officers, the town-clerks of Scotland.

*Section XXIII.* This section extends all the provisions of this Act applicable to ordinary burgage subjects to lands in the burgh of Paisley held by the peculiar tenure of Booking.

*Section XXIV.* This section gives the Court of Session power to regulate by Act of Sederunt the fees payable to town-clerks and keepers of registers of sasines appointed after 8th March 1860, for all instruments and proceedings under the present Act, and the recording of all deeds and instruments executed under its provisions. The Court may either make a general table of fees, applicable to all the burghs in Scotland, or special tables for one or more burghs. It is to be hoped that such table or tables will be framed without delay, if they have not been settled already, for the Act gives the Court power to pass Acts of Sederunt on this subject either during session or vacation.

<sup>1</sup> It may be a question whether existing town-clerks will not be entitled to the exclusive right of preparing instruments of cognition and sasine and notarial instruments in favour of persons acquiring right to unrecorded conveyances, and drawing fees therefor—the provision abolishing the town-clerks’ monopoly not extending to those now in office, and the compensation provision being limited to the case of recorded conveyances operating the effect of instruments of sasine or of resignation and sasine.

## Correspondence.

### STATUTE LAW CONSOLIDATION.

*To the Editor of the Journal of Jurisprudence.*

FORFAR, 15th October 1860.

SIR,—Having noticed in several numbers of your Journal a recommendation to the Lord Advocate to consolidate the Statutes, I beg to mention a class of Statutes, the consolidation of which would confer an inestimable boon on country practitioners; namely,—

1. The nine Conveyancing Acts, passed since 1845.
2. The Stamp Acts.
3. The Fishery Acts.
4. The Publicans' Acts.
5. The Game Acts.
6. The Acts of Parliament, and of Sederunt, relating to Sheriff Courts.

If drafts of the consolidated Statutes were communicated to the profession, I feel confident that it would be in his Lordship's power to present them to Parliament in so perfect a shape, as would save discussion and trouble in passing them.—I am, Sir, your obedient Servant,

A COUNTRY PRACTITIONER.

## Legal Intelligence.

FORFAR SHERIFFSHIP.—We have much pleasure in intimating that the vacancy caused by the removal of Sheriff Ogilvy to Dundee has been filled by the appointment of Mr J. Guthrie Smith, Advocate. Mr Smith's professional attainments and ability are well known to our readers; and we may add, that he possesses in no ordinary degree those minor requisites of industry and capacity for patient application to business, without which the most brilliant talents form but a poor qualification for the duties of the judicial bench.

CRIMINAL STATISTICS OF SCOTLAND.—The tables of criminal offenders for the year 1859, reported by Her Majesty's Advocate for Scotland, have just been published. They show that the total number of persons committed for trial, or bailed, in Scotland for the year was 3472, of whom 2402 were males, and 1070 were females. Of these 3472 offenders, 723 could neither read nor write, and 2009 could only read and write imperfectly. As to the nature of the offences, they are thus classified in the tables:—Offences against the person, 956; offences against property, committed with violence, 313; offences against property, committed without violence, 1783; malicious offences against property, 47; forgery and offences against the currency, 80; other offences not included in the above classes, 293. Of the 3472 persons committed for trial, or bailed, 2503 were convicted, 26 were outlawed, 3 were found insane on arraignment, 262 were acquitted on trial, 45 with a verdict of "not proven," and 217 with a verdict of "not guilty;" 451 were discharged without trial by the Lord Advocate and his deputies, and 167 were discharged without trial "from other causes," the total acquitted or discharged being 883. There was no sentence of death, and only one of penal servitude for life. The great majority of the sentences were imprisonment for comparatively short periods, there being no less than 661 of imprisonment for one month and under, 570 for three months and above one month, and 423 for between three and four months. The county which shows the greatest number of offenders was Lanark, 669; Edinburgh comes next,

supplying 466 offenders; Renfrew, 281; Forfar, 237; Inverness, 194; Argyll, 152; Stirling, 133; Wigton, 112; Roxburgh and Fife, 107 each; Berwick, 98; Aberdeen, 99; and Ayr, 92. Dumfries, Perth, and Elgin follow—the first with 82, the second with 81, and the third with 80 offenders. The remaining counties have comparatively small numbers. The number of offenders in 1858 was 3782, so that 1859 shows a decrease of 310 offenders. The total number for the five years ending with 1859 was 18,437, while the total for the immediately preceding five years, ending with 1854, was 20,246.

**DUNDEE SHERIFFSHIP.**—At the commencement of the October sittings in this Court, Sheriff Logan formally intimated to the Dundee bar that Mr Henderson, the Sheriff-substitute, was to retire—his resignation being only delayed by the absence of the Lord President's signature to a certificate, and that Mr Sheriff Ogilvy, from Forfar, would succeed him.

**OBITUARY.**—Among the events of the last month, we regret to mention that the profession has had to lament the loss of the able and assiduous Judge who, until lately, officiated in the Sheriff Court at Paisley. About a year ago, Sheriff Glasgow was obliged, in consequence of infirm health, to resign the position which he then occupied. His death is intimated as having occurred on the 20th September last.

**METROPOLITAN AND PROVINCIAL LAW ASSOCIATION.**—The eighth meeting of this society was held in Newcastle on Tuesday, the 9th instant. Mr Shaen read a paper on the subject of bar etiquette. It consisted, he said, of three branches, one of which regulated the rights and powers of the bar *inter se*. The second related to the restrictions of personal and social intercourse with those who, although not below the bar, were treated with the lowest possible honour and esteem. The third branch was the declaration to plaintiffs at the assizes that they should retain two counsel, and forbidding the return of fees by a counsel who had neglected to perform the work for which he had been paid. The idea of etiquette maintained by the bar was exactly the same as that of the etiquette enforced by bricklayers. Both liked to raise the amount of their respective wages as high as possible, and departed from the great law of supply and demand, which ought to be the proper regulator of prices in all the relations of man. He thought such facts were sufficient to justify them in offering to the bar the advice lately urged by the master builders on the trade societies, that they should submit an entire code of their rules to some impartial authority—say a retired Judge—and make him frame such rules as would bring them into harmony with the general law of the land. If, when that was done, they would publish the code, he thought probably attorneys and the bar might work harmoniously together; and the morals and manners placed in the hands of students for the bar would be somewhat less absurd, and a good deal less objectionable, than the shifting, ever-erring rules—many of which were far behind the age in which they lived, and were known under the title of "The etiquette of the bar." A discussion then took place, in which the privileges of the bar seem to have been very unceremoniously handled. Mr Glynn considered that professional etiquette was doomed to the fate of the "old clothes shop." Mr Rose was not aware of any rule that required the employment of two counsel. If they wanted to curtail the expenses, they invariably gave a brief to a junior counsel, and one brief only. He did not agree that two branches of the profession should be broken down. He confessed himself that he looked at the bar of England almost with reverence. It was true of the common-law bar—and it was sincerely to be deplored—that there was a great want of first-rate talent there; but that was not pertinent to the question. Of the bar itself he had the strongest possible opinion. He thought that the profession of an attorney ought to be separate; and as regarded supply and demand, he reminded them that there were many exceptions to what was no doubt a general rule. Mr Shaen having briefly replied, the discussion terminated.

## English Cases.

**TRUST—Duty of Trustee for Sale.**—Real estate was conveyed to H. upon trust, as soon as conveniently might be after the death of A., to sell for the best price, by public auction or private contract, and to divide the proceeds among certain persons. On the death of A., H. and the *cestuis que trusts* agreed, that owing to a flaw in the title which could be cured by time, it was inexpedient to sell then, and thereupon W. H. (one of the *cestuis que trusts*) was let into possession of the rents and profits on behalf of all parties interested in the sale monies. Subsequently H., without inviting competition, entered into a negotiation for a sale of the estate to P. for L.6000. W. and M. offered a larger sum, and on their offer being refused, bought in the share of one of the *cestuis que trusts*, and then gave notice to H. that they objected to a sale by private bargain without inviting competition; and at the same time they offered L.7000. They also gave P. notice of their objection. H. nevertheless concluded the agreement with P. On bill filed by W. and M. the agreement was set aside, W. and M. undertaking to bid L.7000. Stuart, V. C.—This case has assumed very considerable importance from the necessity of a discussion that has taken place, as to what the duties of a trustee for sale are, with regard to his obtaining what the terms of the trust require—the best and highest price for the trust property. Lord Eldon, again and again, has recorded his opinion of the necessity on the part of the trustee, if he wishes to perform his duty properly, of taking all means in his power to secure a proper competition for the property, in order to obtain the best and highest price. Other judges have inculcated the same doctrine. After referring to other authorities, his Lordship continued.—In this case I have looked in vain for any steps taken by Mr Hayes to invite a competition for this purpose. No doubt, there are reasons which amount to an explanation of the course that was taken. There was a difficulty in the title. That difficulty in the title made him very wisely resolve not to proceed in the sale without the concurrence of all the *cestui que trusts*. I have endeavoured to find any sufficient reason why the difficulty as to the title should be a reason for not inviting competition, and I have not heard any reason suggested, nor does any suggest itself to my own mind, why a difficulty as to the title should be a reason for not making some inquiry for a purchaser, and endeavouring to persuade persons to come forward, in a discreet and proper way, to make offers for the purchase of this estate. The concurrence of the *cestui que trusts* would no doubt relieve the case from that difficulty; but it introduces into the case this circumstance, that without the concurrence of every one of the *cestui que trusts* the steps taken in negotiating with Mr. Pearson were wholly unjustifiable.—(*Harper v Hayes*, 8 W. R. 600.)

**RAILWAY—Right to subjacent and adjacent Support.**—In 1836 the Durham Junction Railway Company commenced building the Victoria Bridge, for carrying their line over the river Wear, the abutments and foundations of one end of the bridge resting upon land purchased by the company from Mr Boulcott. Under the surface of this land there were strata of coal which had been partially worked, but abandoned since 1791, the workings being now filled up with water. The Victoria Bridge, which was stated to have cost L.38,000, was completed in 1838. All the property and rights of the Durham Junction Railway Company had become vested in the plaintiffs, who ultimately in 1854 received the name of the North-Eastern Railway Company. In 1859 the defendant, who had obtained a mining lease from Boulcott, commenced operations near the railway, with a view, as alleged in the bill, to pumping out the water from underneath the surface occupied by the abutments of the bridge, and served the plaintiffs with notice of his intention to work the mines. The plaintiffs warned the defendant that the coal or water could not be removed from

underneath the land in question, or the immediately adjoining land, without endangering the Victoria Bridge, and causing great and irreparable damage to the plaintiffs, and had filed their bill to restrain the threatened subtraction. Evidence was adduced as to the state of the mine, and the support afforded to the surface by the strata of coal and the hydrostatic pressure of the water with which the mine was now filled. It was stated, that if the water was drawn off, the pillars of coal were liable to "creep or shrink," and cause the surface to subside, as the veins of fire-clay with which the coal was intersected became disintegrated, and crumbled away when left dry.—*Held*, in the circumstances, that, although the vendor will be restrained from working the mines underneath or adjacent to the land purchased, so as to cause any injury to the surface and superincumbent works, the purchaser cannot, in the absence of any contract, compel him to keep the mine filled with water. Wood, V. C.—At common law, independently of any question of conveyance, a man was entitled to have his soil in its natural state supported by the adjacent soil; and therefore the adjoining owner could not remove any portion of his own so as to cause his neighbour's land to fall in, either from below or laterally. At common law, a man had no further right; and where he erected buildings upon his land and placed additional weight upon it, he was not entitled to support for that additional weight. But the owner of one piece of land who had conveyed the adjoining piece for the express purpose of having buildings erected upon it could not derogate from his grant, and the purchaser acquired the additional right of having his buildings supported, or having that purpose for which he purchased the soil carried into its full effect (*The Caledonian Railway v. Sprot*). The land, then, being sold with this implied warranty, that it should remain unaffected by any operation under the surface, did this warranty apply in the same way to the accidental circumstance that the mine was filled with water, in the same degree in which it applied to any operations which might be performed on the land in its ordinary state, and in that state in which everybody had a right to expect from the commencement it would be enjoyed? Upon that part of the case *Arkwright v. Gell*, 5 M. and W. 203, was very important. His Honour, after referring to that case, in which no grant of the waste water thrown upon the adjoining land could be presumed, said, that the principle was not as stated in *Mayor v. Chadwick*, whether the channel was artificial or not; but whether or not the Court had before it the origin and the purpose for which the particular work was done, and the distinct circumstances of the enjoyment and the user. Taking that principle, and looking at the circumstance under which the contracting party made the conveyance (the circumstance that the sale was compulsory being regarded as immaterial), the question was, whether or not the circumstance of the shaft being filled with water, with this enormous upward pressure, was a circumstance upon the continuance and duration of which the plaintiffs had a right to rely. He could only come to the conclusion, that it was an accidental state of circumstances of such a character, in a mining country, that on the contrary, they had every reason to expect the possibility—probability might be a question of time—that such a state of things would be altered. It was not a state of circumstances which the owner could be expected to guarantee, for it was in effect asking him to keep his mine in that drowned state for all time. It was an accidental condition, and known by every one to be accidental. The expense of sinking a new shaft would be immense; and if the plaintiffs were to have the benefit of the existing state of things, it was for them to have stipulated for its continuance.—(*North-Eastern Ry. Co. v. Elliott*, 8 W. R. 603.)

THE

# JOURNAL OF JURISPRUDENCE.

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A WORD WITH MR FRASER ANENT JURISDICTION.

*The Conflict of Laws in Cases of Divorce.* By PATRICK FRASER,  
Advocate. Edinburgh: T. & T. Clark.

**THERE** must be something contagious in the nature of conjugal quarrels; for the mere mention of a matrimonial suit is sure to set a company of lawyers by the ears. Philosophers inform us that it is a property of all highly electrical bodies, to attract to their sphere other substances in a similar state of molecular tension; a principle which may perhaps explain how it is that the class of questions alluded to, has allied itself with another department of jurisprudence equally impulsive in its tendencies, and dangerous to handle. Jurisdiction and divorce are the two fiery steeds which our mettlesome jurists delight to drive when wearied with the dull monotony of the municipal law. Mr Fraser has undertaken to write the history of the collisions and conflicts which they have encountered in their perilous career.

As early as the time of Lord Bacon, it would seem the courts of law had begun to quarrel about jurisdiction; and, we grieve to say it, the policy of moderation which that great aphorist recommended, is as lightly esteemed by the judges of the present day as it was in the reign of Queen Elizabeth.

Starting from the ancient maxim, that a decree pronounced by a court of incompetent jurisdiction is a nullity, it has been the practice of the modern tribunals, in adjudicating upon the rights of foreigners, to arrogate to themselves the right of determining whether the jurisdiction of a foreign court is well exercised; and, according to the opinion they may form upon this question of foreign municipal law, depends the issue, whether they will sustain

or reverse its decrees. In the conflict of laws relative to divorce jurisdiction, the Scotch courts have been rather shabbily used; their most solemn judgments having been treated as so much waste paper by the judges of the English courts of law, whenever these happened to run counter to the prejudices of the English judicial mind. Some curious instances have been brought to light by Mr Fraser, of the perversity of spirit which has characterized the proceedings of the English judicatures, and which has led them at one time to refuse effect to our decrees, as being in excess of jurisdiction, and at another time to claim jurisdiction on similar reasons, and in respect to similar grounds of action.

But it is not our purpose at present to follow Mr Fraser in his strictures upon the conduct of English judges in reversing Scotch decrees—conduct which, as he truly observes, contrasts unfavourably with the spirit of comity uniformly evinced towards the law of England by the courts of our country. The reader, we presume, will be more interested in hearing what Mr Fraser has to say about the chequered life and suicidal end of the Conjugal Rights Bill, and the great jurisdiction controversy to which it has given rise. In detailing the various stages in the progress of that unfortunate measure, the author exhibits a natural, we had almost said a fatherly interest in making the public acquainted with its merits; his narrative only wants the "*quorum pars magna fui*" of the heroic annalist, to secure for it the character of the only correct and authentic report of the proceedings. We believe it is no secret that the Bill originated with Mr Fraser himself; and we suspect that that indefatigable gentleman had also a good deal to do both with the Faculty resolutions and the consequent modification of the measure by the Lord Advocate, of which he has written the history. For ourselves, we had so high an appreciation of the value of the leading provisions of the Bill, that we did not hesitate to express our regret that it should have been sacrificed, in consequence of a difference of opinion on the least important feature in its contents. We may mention that the Lord Advocate explained at a recent meeting of the Faculty of Advocates, that he had postponed the Bill in deference to the opinion of the Lord Chancellor, in which he was disposed to concur—a circumstance which ought to exonerate the Lord Chancellor from some portion of the censure which the author has passed upon his conduct.

It is not surprising that so active a supporter of the Conjugal

Rights Bill as Mr Fraser, should have adopted the usual and legitimate means of enlisting public opinion in its favour. We may have our doubts as to whether his brochure is calculated to smoothen the way for the future passage of the Bill through the Upper House; but we cannot refuse to it the praise of being an admirable *ex parte* vindication of the measure, and of what we, on this side the Tweed, may call the popular side of the jurisdiction controversy. But before we part company with the author of the pamphlet, may we be permitted to ask him, what malign influence presided at its christening? We cannot believe that Mr Fraser's brethren have become so professionally eclectic in their reading, that they require to have a political pamphlet served up to them under the guise of a treatise on the "Conflict of Laws."

As an impartial estimate of the difficulties and bearings of a great legal problem, the treatise de Conflictu must be pronounced a failure. Mr Fraser has aspired to settle a question which divides the opinions of the great lawyers of our time, and which, in so far as affected by judicial decision, has remained in a state of equilibrium for the last thirty years. He has done so by throwing the sword of a forensic disputant into the scale. His tone is that of an advocate; his object persuasion, not conviction. Such at least is the opinion we have formed of an argument in which logical difficulties are surmounted by the administration of pungent stimulants to national prejudice, and which treats with derision the gravest decision of the most august tribunal in the world, if it happens to trench by a hairbreadth on the author's favourite theory.

It is, doubtless, easier to criticise than to invent; and as we are at the present moment in a position to exercise the critical function, we shall not surrender that vantage-ground by attempting to answer a pamphlet which is considerably larger than the entire space of our monthly issue. With much of what Mr Fraser has written, we are disposed to agree; but we do not think that he has done full justice to the jurisdiction question in all its bearings; and, accordingly, it is to that part of his argument that we shall address our observations. Mr Fraser states fully and explicitly the question at issue between Lord Campbell and himself, as reported in the *Times* of 24th August last; but he omits to notice a statement which we have on the authority of the same report by the same journal, and which is calculated materially to influence our judgment, if the opinions of the great lawyers of our own age are entitled to any



portion of the respect which Mr Fraser showers upon Collerus and Rodenbergius. That circumstance is, that the Lord Chancellor's opinion against sustaining the *fora originis* and *delicti* was communicated to the House as the opinion of all the Law Lords, and with their consent. Amongst those learned personages, there is at least one whom Mr Fraser will allow to be competent to form an opinion on a question of jurisdiction; for he refers (at p. 22) to Lord Brougham's opinion in the case of *Warrender*, as "one of the finest specimens of forensic eloquence, of exact and logical reasoning, and of exhaustive learning, which our times can furnish." Another noble and learned lord there is, who for many years past has exercised jurisdiction more extensive and infinitely more varied than was ever claimed by Roman praetor. Before his retirement from the bar, Mr Pemberton enjoyed the reputation of being at once the soundest lawyer and the most accomplished advocate of his time; and since then, his time has been devoted to the service of the public as a member of the Judicial Committee of the Privy Council, in the elucidation of the immense and varied category of laws which are bound up with the administration of justice in the British dependencies. The decisions of the same right honourable gentleman (now Lord Kingsdown), on appeal from the English Consistorial Courts, are not the least admired specimens of the learning and judgment which are conspicuous in the Privy Council Reports. Lord Kingsdown's opinion, Mr Fraser will admit, ought to count for something in a question relating to divorce and to jurisdiction. That opinion, if the *Times'* report be correct, is in entire harmony with Lord Campbell's and against Mr Fraser. Supported by these authorities, we venture to call in question the propositions maintained by the latter jurist, notwithstanding the air of confidence with which they are announced.

The doctrine laid down by Lord Campbell and the Law Lords is, that domicile is the proper basis of jurisdiction in cases of divorce. Mr Fraser admits the validity of this, but maintains that jurisdiction may also be founded *ratione delicti* and *ratione originis*; which Lord Campbell, on the other hand, denies. We think Mr Fraser has judged wisely in showing a disposition to abandon the *forum originis*. That dogma has slumbered in the text-books for half a century. It may not, as Lord Kinloch holds, have received its death-blow by the decision of the House of Lords in *Piddie v. Grant* (1 W. & S. 716); but it may safely be asserted, that since

the decision in question, the Court of Session Reports exhibit no sign of its vitality. The English cases of *Deck* and *Bond* (2 *Law Times*, 542), on which Mr Fraser comments (p. 52), were, as he justly observes, decided on the basis of the *forum originis*; but they were so decided, not in conformity with the public law, but because it was held that the Divorce Act gave the Court such jurisdiction. We concur with Mr Fraser in thinking that it would be better to deprive both countries of this equivocal jurisdiction, rather than allow the courts of law in either to entertain questions affecting the status of individuals, after the total severance of the tie that connects these individuals with the land of their nativity.

We proceed to notice the main topic of the author's argument—that in which he seeks to establish the *forum delicti* as a basis of civil jurisdiction.

"Independent of domicile," says our author, "jurisdiction arises from obligation, and the interpretation of this generic word I shall take from the Institutes." He then proceeds to cite the well-known formula for the division of obligations into those which arise *ex contractu*, *quasi ex contractu*, *ex maleficio*, and *quasi ex maleficio*. In the above sentence, we have the germ of the gigantic fallacy which pervades the whole of the author's reasoning on the subject. Where can Mr Fraser find authority for the general proposition, that jurisdiction arises from obligation? If there had been any worth citing, it would not have escaped the observation of the accomplished civilian whose dictum we are reviewing; but we do not hesitate to assert that there is none. Jurisdiction of a special and limited character did arise *ex delicto* under the Roman law, and has been adopted precisely as it then existed by all the nations of modern Europe. This was jurisdiction for the punishment of crimes. Jurisdiction of a less limited scope was also exercised by the Roman praetor, *ex contractu*, in conformity with the provisions of the code (III. 13. 2) to that effect. In modern jurisprudence, this ground of jurisdiction has only been asserted by the courts of those countries which profess to adopt the Roman code as an authority in the practical administration of the law. But Mr Fraser has bridged over a wide gulf, when he erects upon those insulated cases of the *forum speciale* a general and comprehensive jurisdiction, *ratione obligationis*,—a *forum* which certainly has not yet attained a place amongst the *nomen juris*, and which derives no support from any of the authorities he has cited.

It is abundantly clear from the statement of the argument, that unless the *forum contractus* can be so enlarged as to extend to obligations *ex delicto*, the whole theory must fall to the ground. The *forum delicti* of the criminal courts is asserted on very special reasons of policy; the necessity, namely, which exists for vindicating the supremacy of the laws, by punishing offences within the territory where they are committed. But the *forum contractus* rests on a basis nearly allied to the doctrine of "prorogation," the principle being, that one who has entered into a formal contract in a certain place, does by his act and deed bind himself to submit to the laws of the place with respect to its enforcement (see Dig. V. 1. 19 and 20; Cod. III. 1. 32). This is conformable not only to the principles of law, but to common sense. Qualified as it is in modern times by the condition of personal citation within the territory, it might almost be said, that a defender is barred by personal exception from objecting to such a jurisdiction.

Apart from the dictates of positive law, there does not appear to be any good reason for extending the principle of jurisdiction *ratione contractus* to obligations arising out of the mere conduct of individuals in the ordinary relations of life. A party who enters into a determinate contract, has generally in his view the law of the country in which he contracts, as giving a particular complexion to the transaction. The law of the locality, moreover, is imported into the contract for all purposes of interpretation; from that law it receives its efficacy; and by that, if by any legal system, he must be held to have contemplated its enforcement. But when we pass the confines of positive stipulation, it cannot be said with truth or propriety, that individuals are in the habit of comporting themselves with reference to the provisions of any particular legal system; certainly it is only by resorting to a most violent legal fiction, that any course of conduct not matter of contract can be held to import a tacit obligation to submit to the local judicature. The obligation arising *ex delicto* is itself a species of fiction, or rather a convenient phrase, expressing the liability to make compensation. The notion of an implied obligation, to submit to the jurisdiction in respect of the implied obligation to compensate, is, if we may use the term, a fiction of the second order—a mere *nomini umbra*, by far too impalpable and elusory to sustain what Mr Fraser has attempted to build upon it.

We are not aware that any writer of authority has attempted to

extend the doctrines of the *forum contractus* to obligations not arising from a promise. Mr Fraser has presented us with a number of quotations in connection with the matter (pp. 25–28); but they are all beside the subject. “*Collerus de Processibus Executivis*” is a very good name to conjure with. We have not the pleasure of his acquaintance. *Mævius de Arrestis* we know, and *Peckius de Jure Sistendi*; but *Collerus*—

“*An tertius e.cœlo cecidit Cato?*”

But neither *Collerus*, nor *Brunneman*, *Felix* or *Von Martens*, *Kent*, *Story* or the *Voets*, have advanced the boundaries of the *forum contractus* one step beyond the limits assigned to it in the civil law. *Huber*, who by the way is not quoted on this point by Mr Fraser, has a passage in the oft cited chapter, *de Foro Competente*, which lends some countenance to the views of the popular school. We refer to his classification of the *forum contractus* and the *forum delicti* under the common denomination of “*forum rei gestæ*.” But when we peruse his explanations, the classification is found to be not real, but arbitrary. *Forum contractus*, according to *Huber*, is jurisdiction for the enforcement of a promise; *forum delicti*, jurisdiction for the punishment of a crime.

In the application of these doctrines to the special subject of consistorial jurisdiction, Mr Fraser does not display his usual felicity of argument and illustration. That we may not do injustice to the argument, we shall give it in the author's words:—

“Now as to *delicts*,—Is not the same reason applicable for sustaining the jurisdiction of the locus? There are three actions which may be raised in consequence of adultery. 1st, A criminal prosecution; 2dly, An action of damages against the wife's seducer; 3dly, An action of divorce.

“As to the first, it is settled according to the law of nations, that the courts have power to punish, for crimes committed by foreigners within their bounds. This at least is a fixed point on the field of controversy. In the second case, if the seducer be a foreigner, who commits adultery with a Scotch woman, it seems a mere mockery to say that the injured husband must follow him to other countries and claim damages there. The foreign court may not even allow this kind of redress for conjugal infidelity. Caught redhanded in the fact, the foreign paramour must answer before a Scottish civil jury, for his injury to the husband. The remaining action is divorce; and it will be found that all the reasons for recognising the jurisdiction as to the other two, concur also in favour of it, here. The rule, and the reasons for it, are well stated in the 69th Novel of Justinian (chap. i.), to which, as being too long to cite, this reference may be sufficient. *Huber* states it in general terms in a work of his which is seldom cited: ‘*Proinde, qui ad tempus in quibusdam locis agunt, fixo alibi domicilio et sede fortunarum suarum, an hi apud dietas suas temporarias conveniri non possunt? Si posse dicas, frustra domicilium esse causam fori statuas; si non poterant, videndum, ne res arguat contra; cum peregrini etiam in locis, ubi*

reperiuntur, conveniri soleant, et forum eligere cogantur, ubique gentium; juxta regulam decantatam,—ubi te invenio ibi te judico" (pp. 27-28).

Here we have, in the first case, the assertion of a truism; in the second, the question is begged, or rather assumed, without even an apology for an argument; in the third, we have a modest appeal to the confidence of the reader, backed by a quotation which wafts us at once into the icy regions of scepticism. Surely the imp of the printing-office has been making havoc with Mr Fraser's quotations. It cannot be that the author read that passage from Huber as an argument for the *forum delicti*. It is simply an assertion of the *forum domicilii* as we understand it in Scotland—the "formal domicile by temporary residence" of Lord Brougham—in contradistinction to the *domicilium et sedes fortunarum*, which gives the law in questions of status and succession.

We are sorry to learn that Mr Fraser has formed an unfavourable opinion of the Poles. Refugees of all nations and kindreds he seems to regard with an instinctive abhorrence, akin to that which the uncircumcised Philistine excited in the breasts of the wandering children of Judah. He might possess his conscience in peace, were he satisfied that her Majesty's subjects were the only persons likely to profit by the plenary indulgence he anticipates, as the consequence of a relaxation of the rules of jurisdiction. But his spirit is stirred within him, when he thinks of the Saturnalia that may ensue amongst those distressed foreigners, whose involuntary expatriation augurs ill as to their reverence for ancient tradition. He is haunted by the nightmare of a Polish refugee, who is always beating his wife; always committing adultery; always bidding defiance to the *forum delicti*. Hear how he dilates upon this grievance:—

"Is the *Scottish* wife of a Polish Count—now teacher of languages—to be remitted to the courts at Warsaw—who would not perhaps hear her, because her husband is an outlaw? Must she continue in Scotland for twenty years the wife of a man who lives in notorious adultery? Must the sense of decency of *Scottish* people be outraged for ever by such a spectacle of wrong? Are the *Scottish* Courts entirely powerless, so that they can neither give to the unhappy wife the redress allowed by the laws of Scotland, nor even administer to her the remedy of the law of the Polish domicile? . . .

"If the Polish exile should alternate his moments of depression, in consequence of his misfortunes, by hours of brutal usage towards his wife, she must have some further remedy than the police-office. The future must be provided for by a judicial separation, and a decree for alimony. . . . It would be a hard thing to say, that if this Polish magnate deserted his wife in *Scotland*, for ten years, we could not grant a decree of divorce for desertion, merely because he had still retained his domicile of origin. "On ne peut rejeter de ce temple sacré, des étrangers malheureux qui viennent, avec tant de confiance réclamer la justice."

Shades of Campbell and Dudley Stuart, is this the character—this the likeness of the representative of the oppressed nationalities? Has the pioneer of the solidarity of the peoples degenerated into a wife-beater, a sot, and an adulterer?

“If thou art he—yet oh! how fallen, how changed!”

No; we will not believe that Warsaw's last champion has fallen from his proud eminence into so deep a gulf of profligacy. We suspect that Mr Fraser has been imposed upon. This model refugee—ruffian and gay Lothario though he is—bears a striking resemblance to a certain malicious sprite which Bentham thought he had exorcised, and which, fifty years ago, took the name of the “hobgoblin fallacy.” Is he not even something worse? His Protean faculty of transmutation is, at any rate, calculated to excite suspicion. In one page he appears in the character of an Eastern potentate; in another (p. 29), he figures as a Hungarian nobleman; and again, at p. 26, as a wanderer from the sunny plains of Italy. A most ubiquitous personage. May we not apply the lines:—

“Great is thy power, and great thy fame;  
Far ken'd and noted is thy name;  
And though yon lowin' heugh's thy hame,  
Thou travels far!”

Evidently there is something uncanny about this Pole; besides, his conduct is most immoral and reprehensible. We vote with Mr Fraser for putting him down; and would even invoke the majesty of the *forum delicti* for the purpose, but that a difficulty arises in connection with that awkward condition invented by the civilians, and expressed in the formula, “*si reus illic deprehendatur*.” By all means let us punish this Polish adulterer, even in the theatre of his delinquencies; and, if necessary, with the penalties of the statute 1563. But how are we to catch him? What opinion must Mr Fraser entertain of the temerity of the messenger-at-arms who would venture on putting a summons into the hand of the swarthy polygamist?

Any ground which Mr Fraser may have had for asserting the competency of the *forum contractus* in divorce cases, is completely cut away by the doctrine he afterwards lays down (at p. 48) in commenting on the case of Simonin and Mallac. The rule of the civil law, as laid down by Savigny and expounded by Mr Fraser, is that the *forum contractus* is available in a suit for the enforcement, but

not for the rescinding of the contract. We do not stop to inquire how far this doctrine is to be stretched. Mr Fraser thinks that the *locus contractus* is a bad ground of jurisdiction in cases of nullity of marriage; but, with all deference, there is a great difference between an action for declaring that a contract is null, and an action for rescinding it. We are by no means sure that suits of nullity of marriage fall within the exception noticed by Savigny; the object being, not to undo an obligation that has been undertaken, but rather to declare that there never was an obligation, in consequence of the inability of one of the parties to contract. But, if the exception is good for anything, it ought, in all reason, to exclude the jurisdiction in actions of divorce. It cannot be that we are entitled to regard this right of action indifferently, either as a right arising *ex contractu* or *ex delicto*. In one sense, every breach of contract may be assimilated to a quasi-delict; but it is not so considered in law, for this were to disregard the very distinction in question. However, we will give the author the benefit of the alternative; while we accept his definition of this jurisdiction as one for the "enforcement" of the contract.

Let us assume that the action of divorce arises *ex delicto*. What obligation is it that an action of divorce can be said to enforce? Is it an action for the enforcement of the obligation *not* to commit adultery; or can it be said, with any propriety of language, that the offence creates an *obligation* to live separate?—In the other alternative, and viewing this process as one which arises out of the contract of marriage, the *forum contractus* is excluded; because the conclusions of the summons are not for enforcement, but for dissolution of the matrimonial tie.

Here, in the meantime, we must quit the field of controversy. We trust we have said enough concerning Mr Fraser's speculations to induce all who take an interest in the question to read and judge for themselves. Yet, in confining ourselves to the debateable ground in the author's excursus, we are conscious that we have not done justice to the merits of the work, which is a complete repertory of all the learning on the subject. As a specimen of the author's humorous vein, take the following ingenious argument, respecting the domicile of succession of the Lord Chancellor:—

"But generalities have far less effect in argument than examples. A great succession suit is clearly in store for Scottish lawyers. At the risk of scaring the game, I shall state a case that will prove not uninteresting to the learned Lord who is so much in favour of the law of domicile. In what country is the Lord

Chancellor domiciled? Of course, so prudent a man has made his will, and 'signed, sealed, and delivered' it according to the law of England, with which he is familiar, and which he has too easily assumed to be the law of his domicile. If the rule established by the Privy Council in *Stanley v. Bernard* be correct, which requires the formalities of execution of a will to be according to the law, not of the place of execution, but of domicile, then the will of this high functionary stands somewhat in peril. His domicile at the present moment is clearly in Scotland. He is a Scotsman by origin,—was educated in Scotland,—and only left it in his manhood to push his fortune in England. No doubt, he has spent in that country a considerable portion of his life; but his affections were always centered upon his native land. He has two peerages in his family; and both the titles are taken from the county of Fife. The title of his son is 'Stratheden,' and he himself is 'John Baron Campbell of St Andrews.' When leisure came with high honours, and a successful career was crowned with wealth, where was it that he took up his local habitation? Not in England, where his fortune had been acquired, but at Hartrigge, in the county of Roxburgh. It is true that he still holds the office of Lord High Chancellor; but he is Chancellor not of England alone, but of Great Britain. The Great Seal accompanies him to Scotland, and he is only in London when the cruel necessity of business compels him to sever himself from the land of his affections. This is the case of *Hog v. Lashley*, where a Scotman went to England, and returned laden with spoil, to buy an estate in Scotland, still keeping up some connection with the mercantile house in London, through which his fortune had been acquired. The domicile of origin was there held to be easily acquired,—just as, in other cases, it has been held to be with difficulty lost. In the case of Sir Hugh Munro, he had been absent in England for eleven years; his establishment was in London. 'There were his carriages, his furniture, his plate, his pictures, his library, his wines; every article of use or enjoyment in life according to the way in which he chose to live;' and yet he was held to be a domiciled Scotsman. 'There must be residence and intention; residence alone has no effect *per se*, although it may be most important as a ground from which to infer intention.' There must be, as Voet says, the '*propositum illic perpetuo morandi*.' Surely it cannot be said that this distinguished individual, whose acts indicate such a hearty attachment to the country of his fathers, has any intention of perpetual residence in England. His household gods are at Hartrigge; and the only circumstance in favour of the English domicile is the accident of being an officer of the Government, which many Scotsmen are, and which might cease in a day by rebellion in the camp. The mere possession of, and residence in, a house in London, or the holding a temporary office, does not create a domicile. The distinction between residence and domicile is clear. There may be residence without domicile, and domicile without residence; residence is preserved by the act, domicile by the intention; and the intention for a Scottish domicile cannot be mistaken.

"In the elucidation of this case (which may occur in reference even to a question of legitimation, supposing that the hint is taken of executing the will according to the formalities of the law of both countries), some curious information may be obtained in the inquiry after the intention. All the correspondence of the Chancellor for years will be ransacked; and the biographies of his two great contemporaries, now in his *escritoire*, will be made good evidence in the suit. The passages which describe the love of country, especially on the part of the Chancellor of the Edinburgh University, will make these interesting documents relevant in the question of intention; and if that renowned personage happen to be the survivor, the world will be favoured with a commentary upon his own biography by himself."

It is not the least of Mr Fraser's merits that he has contrived to treat a somewhat dry and erudite topic in an attractive manner.



The conflict of laws is a theme not fruitful in romantic incident or thrilling adventure. Mr Warren would be puzzled how to weave it into a novel, or sing its praises in an epic. It is impossible even to get up any sympathy for Mr Lolley, though he was transported to signalize the contempt which the twelve judges entertained for Scotch decrees. If our courts, acting on the hint thrown out by Mr Fraser, should hang a few English adulterers by way of asserting the validity of the *forum delicti*, some future Macaulay may perhaps present us with a companion picture to the trial and execution of Nuncomar. But bigamy and transportation, the Liverpool Assizes and the Newgate Calendar,—these are not the most appropriate subjects of tragic or historical description. As it is, Mr Fraser has invested his essay with as much of dramatic interest as could well be drawn from such intractable materials. Whatever may be the fate of the doctrines he has espoused, they are not likely to be let die for want of a zealous and skilful apologist.

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NOTES ON THE TITLES TO LAND ACT, 1860.

(Concluded.)

As the Bill was originally framed, sections 25, 26, and 27 contained provisions of very considerable importance which have not found a place in the Act as it has passed. By the original section 25, it was proposed to provide, as to lands not held burgage, that where the heir of the last entered superior had not completed a title to the superiority, the vassal might obtain an entry from the Crown or Prince of Scotland respectively, or, in his option, from the mediate or other over-superior; and that the immediate superior, on completing his title, should be entitled to claim the casualties, feu-duties, etc., and that these should not be claimable by the superior who had actually granted the entry. It is to be regretted that this provision, which is greatly simpler than the remedies introduced by the Transference of Lands Act (10 & 11 Vict., c. 48, sec. 8, *et seq.*), was not pressed. By the original section 26, again, it was proposed to dispense with any necessity for the word "dispone," or other words of *de presenti* conveyance, and to make words of bequest sufficient to convey lands and other heritable subjects. Some difference of opinion exists as to whether the magic word "dispone" is absolutely essential to a valid conveyance of

lands, but the weight of authority is in favour of its being indispensable. As regards *mortis causa* conveyances at least, this state of the law ought to cease, and it should be provided that heritage may be conveyed by any words clearly evidencing the grantor's intention, whether they amount to a *de presenti* conveyance or not. This provision, however, was allowed to drop out of the Bill from some unexplained motive. Lastly, the section 27, as it stood at first, provided that the recording of a deed in the General Register of Sasines—the deed being retained in the public custody, and transmitted to the Register of Deeds in the books of Council and Session—should answer the purpose of registration in the latter record. This would have been a valuable improvement on the existing system, but it too was withdrawn.

*Section XXV.*—This section, the construction of which is more than ordinarily clumsy, is intended to carry out the provision of section 5, that where a deed containing a clause of direction is presented for registration in the Register of Sasines, the warrant of registration must bear express reference to the clause, otherwise it cannot receive effect, but the deed must be engrossed *ad longum*. Agents will require to bear this section and its annexed schedule (K) in mind, in recording deeds containing clauses of direction.

*Section XXVI.*—Hitherto, when a town-clerk has been the proprietor of lands within burgh on which it was necessary to take infestment, it has been the practice of the Court of Session to appoint the Sheriff-clerk of the county or some other official to act as town-clerk *pro hac vice*.—*Duff v. Magistrates of Elgin*, 16 January 1823. It is now provided, and very reasonably, that town-clerks and keepers of Registers of Sasines shall no longer be incapacitated from expediting or recording conveyances, notarial instruments, or other writs in which they are personally interested. It is scarcely necessary to say, that in the very improbable contingency of any of these officials taking advantage of his position to secure for himself a preference to which he is not fairly entitled, the Court would at once set it aside and restore the legal order.

*Section XXVII.*—The Montgomery and Roseberry Acts (10 Geo. III., c. 51; and 6 & 7 Will. IV., c. 42) gave an heir of entail power to excamb, with the authority of the Court, certain portions of the entailed estate; the lands given being freed of the fetters of the entail, and the lands received being brought within

them. Doubts having arisen as to the effect of contracts of excambion which did not contain the destination and fettering clauses of the entail, the 4 & 5 Vict., c. 24, was passed, providing that these need not be inserted, but that it should be sufficient if they were referred to as in the original deed recorded in the Register of Tailzies. The Rutherford Act (11 & 12 Vict., c. 36), while it provided, by its section 37, that excambions under the Roseberry Act might be carried through under the forms of the new Act, provided also, by section 5, that an heir of entail in possession, under an entail made prior to the Act, might excamb the entailed estate in whole or in part, with certain consents, and under the authority of the Court. The opinion having come to be widely entertained that, in excambions under the Rutherford Act, the contract of excambion, being a deed of constitution as respects the lands received in exchange, must contain the destination and the fettering clauses (*vide* Duff on Entails, p. 77), the section 27 of the present Act provides that the destination of heirs and conditions, etc., of entail need not in any case be inserted at length in the conveyances of the lands obtained in exchange for entailed lands, or in any writs following thereon, but may be referred to as in the recorded deed of entail, or in any of the recorded progress titles following on such original deed. To allow of such reference to it, the deed of entail must have been recorded in the Register of Tailzies, and the progress title, which may be an instrument of sasine as well as any other writ, must have been recorded in the appropriate Register of Sasines. The section is quite general in its terms, and will cover the case of excambions under the Roseberry as well as under the Rutherford Act.

*Section XXVIII.*—This section provides for the case where lands excambed under the authority of an Act of Parliament are burdened with debt. It enacts, that after the registration of the contract or deed of excambion in the Register of Sasines, the debts affecting the lands given in exchange shall affect only those received in exchange; and if these latter have been themselves burdened, their burdens shall affect the first mentioned lands only,—the old order of preference being maintained in each case. In order to protect the interests of creditors, it is provided, that before the excambion of burdened lands is authorized (in addition to the ordinary procedure), such intimation thereof as the Court of Session may consider necessary shall be given to all creditors having interest, who

may appear and oppose it. No method of intimation is pointed out; but it will be proper, in all petitions for leave to excamb lands burdened with debt, to insert a prayer for intimation to creditors. There is a further provision, that in the contract of excambion, or in an annexed schedule recorded therewith, full particulars of all the debts shall be set forth, both in regard to their original constitution and transmission, if such latter has taken place. It is to be observed, however, that no sanction is, expressly at all events, attached to this provision; and the question may arise, whether, if it be not complied with, the excambion is good with all its statutory incidents. No prudent conveyancer, however, will take shelter under this doubt, but will give, as required, full information as to the debts,—inserting at the same time in the deed or contract of excambion, what seems to be an unnecessary declaration, that they are to burden the lands to which they have been transferred, as already pointed out.

*Section XXIX.*—This section gives heirs of entail in possession the same right of granting, with the authority of the Court, bonds and dispositions in security for entailers' debts which they now have under the 11 & 12 Vict., c. 36, and 16 & 17 Vict., c. 94, with reference to provisions to younger children.

*Section XXX.*—By this section it is provided that the short clauses of consent to registration for preservation, and for preservation and execution, introduced by the Transference of Lands Act (10 & 11 Vict., c. 48), may be used in all deeds with the same meaning as that given to them in the said Act.

*Section XXXI.*—Under a reference to particular cases, tolerably exhaustive, no doubt, but requiring scrutiny by the prudent conveyancer, this section provides that, instead of being inserted at length, real burdens may be referred to as already set forth in any conveyance or notarial instrument recorded in the appropriate Register of Sasines of the lands to which such burdens apply. Such reference is declared to be equivalent to and have the legal effect of a full insertion of the real burdens in the deed or instrument in which it is made. The greatest accuracy, of course, must be observed in making the reference.

*Section XXXII.*—By the 13 & 14 Vict., c. 13, it was enacted, that when lands or houses are acquired for religious or educational purposes, and have once been feudally vested in the office-bearers of the congregation, or society, or body of men acquiring them,

or in trustees for their behoof, such investiture shall inure to their successors in office without any transmission or renewal. The provision was also extended, *mutatis mutandis*, to heritable securities held by or for behoof of such bodies, etc. In the case of lands and houses, as the vassal never died, it was enacted, that where no special agreement had been made as to casualties, they should be exigible every 25 years. The section 32 of the present Act extends the provisions of the Act just mentioned to all trusts for the maintenance of ministers of religion, missionaries, and schoolmasters, or for the maintenance of the fabric of their places of worship, school-houses, dwelling-houses, offices, or other like buildings; declares that feu-duties and other heritable property, as well as lands, houses, and heritable securities, shall fall under these provisions; and further, that the General Assemblies, Synods, and Presbyteries of the Established Church, and of all other Presbyterian Churches in Scotland, shall be entitled to take benefit under them. What the occasion for this last provision was, it is rather difficult to say, the former Act being sufficiently general in its application.

*Section XXXIII.*—Under the section 9 of the Titles to Land Act, 1858, it was provided, that a writ of resignation by a subject superior endorsed on a deed which was a warrant for resignation should be equivalent to a charter of resignation in favour of the person in right of the deed. In order to complete his title, it was necessary that the writ of resignation should be recorded; but as both the deed and the writ must enter the Register at the same time, the recording of both had the double effect of being equivalent to an instrument of sasine upon the deed as well as upon the writ, thus creating a mid-superiority (see *ante*, vol. ii., p. 530). The way to obviate this, was to add a provision that “the recording of such deed along with such writ shall *not* have the effect of an instrument of sasine following on such deed.” The section 9 of the Act of 1858, in making this provision, unfortunately left out the short but important word “*not*,” thereby making the evil more unquestionable instead of remedying it. The omission has now been supplied by the section 33 of the present Act, which has a retrospective effect. All mid-superiorities, therefore, which had been created by the blunder in the former Act, are to be held as sopited.

*Section XXXIV.*—Under the old system of conveyancing, no part of the deed was more liable to prolixity than that containing

the description of the lands conveyed. The Act of 1858 introduced a great reform in this respect by providing (section 15),—1st, that where lands had been described in a recorded conveyance or other writ, it should not be necessary to repeat the description in subsequent conveyances or other writs, but it should be sufficient to specify the leading name or other short distinctive description of the lands, with the name of the county and parish, and to refer to the particular description in the prior recorded conveyance or other writ; and, 2d, that in any other subsequent conveyance or writ it should be sufficient to use such leading name or short distinctive description, with the addition of the county and parish, and to make reference to the conveyance or writ in which such leading name or short distinctive description was specified without again referring to the several conveyances or other writs containing the particular descriptions of such lands. The section 34 of the Act of 1860 repeals the section 15 of the Act of 1858, and provides no substitute for the second provision contained in it just mentioned. In lieu of the first provision, however, it enacts that, where any lands, held or not held burgage, have been particularly described in any conveyance, *discharge*, or other deed or *instrument* duly recorded in the appropriate Register of Sasines, it shall not be necessary, in any subsequent conveyance, *discharge*, or other deed or *instrument*, to repeat the particular description of the lands, but it shall be sufficient to specify the name of the county, and where the lands are held burgage, the name of the burgh and county, and to refer to the particular description in the prior conveyance, etc., in the manner set forth in the annexed schedule. The section itself makes no provision for the use of short descriptions; but, on referring to the annexed schedule (H.), No. 1, it will be seen that such may be used, or the lands may even be set forth as “delineated and coloured                      on a copy of the Ordnance Survey Map hereto annexed, and signed as relative hereto.” The new section is an improvement on the old one, and puts the matter on a simpler footing than previously.

**Section XXXV.** (which is retrospective in its effect) corrects the error committed in section 31 of the Act of 1858, in citing the 8 & 9 Vict., c. 35, instead of c. 31, when making provision for the recording of new or blundered conveyances, etc.

**Section XXXVI.**—This section provides that the words “to be

holden in the same manner in which the grantor of the conveyance held or might have held the same," used in various sections of the Act of 1858, shall be construed to mean that the holding is to be *a me vel de me*, where the investiture contains no prohibition against subinfeudation or against an alternative holding, and *a me* only where the investiture contains such prohibition. At the end of the section there is a somewhat important provision, which would appear to have been introduced into the Bill at a very advanced stage. It is to the following effect, that where the investiture contains a prohibition against a base holding, if the donee enter with the superior within twelve months of the date of the conveyance or instrument in his favour, such conveyance or instrument shall have the same preference in all respects from the date of its being recorded as if it had contained an alternative holding. The effect of this provision will be, that within twelve months a donee with an *a me* holding only, may, by entering with the superior, make his right preferable to any other right whatever, not feudalized, prior to the date of the registration of his conveyance. This is a considerable step in the direction of removing the distinction between an alternative holding and an *a me* holding only, and it would seem as if the distinction were only maintained from a regard to the interests of the superior or his agents.

*Section XXXVII.* corrects a typographical error in section 33 of the Act of 1858.

*Section XXXVIII.*—The section 21 of the Act of 1858 provided machinery by which a judicial factor, or *other judicial manager*, might complete a title to lands forming part of the estate under his management. He had to present a petition to the Court for authority to do so; and if the petition specified the lands, the warrant of Court was also to specify the lands, and to have the effect of a disposition in his favour from the party whose estate was under his management. Great difficulty was felt as to what officers were comprehended under the terms "*other judicial manager*." Giving the largest latitude to them, they would comprehend factors *loco tutoris* and *loco absentis*, and *curators bonis*,—officers in whose persons it has never been the practice, and it is contrary to principle that a title should be made up. The present Act, in declaring more explicitly the effect of the warrant of Court on a petition for authority to complete titles, and repeating the enactment as to the machinery for obtaining it, limits its provisions to the case of "*a*

judicial factor" only; but, unfortunately, it does not repeal the provision in the Act of 1858, which would therefore appear to be still operative. Under the present Act, the warrant of Court is expressly declared to be equivalent to a disposition of the lands, and an assignation of any heritable securities contained in it, in favour of the judicial factor by the person, whether in life or deceased, whose estate is under judicial management, and where such judicial factor has been appointed on a trust-estate, which has been vested in a trustee or former judicial factor, it is to be equivalent to a conveyance by such trustee or former factor, whether in life or deceased. This is a very comprehensive provision, and seems to meet every case.

*Section XXXIX.*—By this section a step is taken towards further simplification in the mode of entry with the superior,—charters of adjudication and sale, as well as of resignation, being declared to have the effect of a confirmation of all the deeds and instruments necessary to complete the vassal's investiture. It is to be borne in mind, that by the Act of 1858, writs of resignation are declared to have the same effect as charters of resignation.

*Sections XL. to XLII.*—These sections do not call for remark.

*Section XLIII.*—This section declares that the various provisions of the Act shall take effect from the 1st October last. The want of such a distinct and categorical enactment in the Act of 1858 was much felt by the profession, but that defect has been avoided in the present Act.

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#### ON CASES OF FILIATION OF BASTARDS.

IN our Number for September 1857, we pointed out the serious consequences resulting from the new law of evidence when applied to actions of filiation and aliment. We showed how prolific of perjury was the system of allowing those parties to give evidence, and how disastrous in the consequences, so that now it was very difficult to fix paternity on a defender. Parochial boards were thus heavily burdened with illegitimates, who were now doomed to be bred and brought up as paupers, neglected in every way, and uneducated in all but vice and crime. The consequent increase of infanticide is well known, though the serious difficulty of proving that a child has been fully born alive leads the authorities, even



in those cases where the mother has been discovered, to accept the unmeaning and unsatisfactory plea of concealment of pregnancy.

The uniform testimony, as now given by all connected with local Courts, is the increasing realization of our forebodings. There are now few actions of filiation and aliment that are not defended. A prevalent error has been adopted by the rural population : that all that is necessary to liberate them from the burden of supporting a child laid to their charge, is deliberately to swear that they never had connection with its mother. Thus it happens, that in cases where guilt is proved beyond all doubt, the defender will not forego the opportunity of perjuring himself, even though without any possible benefit. But in other cases, where the proof for the pursuer is *legally* weak, the defender's oath often upsets her case, though there is little or no *moral* doubt but that perjury has also been committed, though with greater success.

Sheriffs have often threatened to commit defenders for perjury where their oath was discredited. But in such occult cases, perjury might not be easily proved by direct evidence other than the mother's ; and the punishment of the defender would be seriously felt by the mother and her child.

Even in those cases where the mother is successful in her claim, the great accumulation of law expenses on both sides makes the recovery of the aliment most difficult, if not altogether impracticable.

Mr Seton, the talented and indefatigable Secretary to the Registrar-General, read, at the recent meeting of the Social Science Association, a valuable paper on Bastardy in Scotland, containing some important statistical facts bearing on this question. From that gentleman we have ascertained that in 1858 there were, in all Scotland, of births 104,195, whereof were illegitimate 9256 ; and in 1859, the gross number was 106,732, whereof 9606 were illegitimate. In the year 1857, of 7680 illegitimate births, only 1523 had the paternity acknowledged at registration ; whilst 6157 were not thus acknowledged. Of these, only 347 were afterwards registered on Decrees of Court, including both undefended and defended cases, whilst only 156 were legitimated by the subsequent marriage of the parents.

There is no class of cases in which it is more difficult to prove the case against a denying defender. The difficulties which the female pursuer has now to overcome, have been pointed out in our former

article. In leading the evidence, where the witnesses are chiefly females, it is much to be feared, great injury is often inflicted on the moral purity of those connected with the case. It has occurred to many, that a peculiar mode of investigation, adapted to these occult cases, might be made the means of ascertaining guilt or innocence, without any other testimony than the statements of the parties themselves. So soon as the action is brought, and a general denial of paternity entered, the parties ought separately to be judicially examined before the Judge and the agents, but, in the first instance, outwith the presence of each other. The female pursuer should be first examined on all the particulars of the intercourse between her and the defender. This done, the defender should undergo the same ordeal. If necessary, the parties might be recalled for further examination and explanations, and, at the discretion of the Judge, might be allowed to confront each other on some particular points. In this way it is very easy to perceive that the truth, in the great majority of cases, would be discovered and fixed without having recourse to other witnesses. There would be no need for swearing the parties on either side. It might, however, be open to contradict the statements of either party by witnesses, where such was deemed necessary, either to strengthen or weaken the case for the prosecution or the defence. The advantage of this procedure is obvious over that at present adopted, where each party is quite aware of the other's averments, and so quite prepared to make up a tale to support the one side and demolish the other. The advantage, however, in the present mode of procedure is not on the side of the pursuer, who is called on to give her statement before any proof is led, whilst the defender comes in after the woman has closed her proof, and has thus exposed her whole case to him.

The Evidence Act, which admitted the parties as witnesses in the cause, specially "declared, that nothing herein contained shall alter or affect the authority or practice of the Courts in Scotland as to judicial examination." Lord Medwyn, in the cases of *Shankland*, 18 June 1835, and *Patrick*, 26 Nov. 1845, expressed his approval of that mode of expiscating the truth. In the former case, his Lordship (who had great experience as Sheriff of a large county for many years) remarked, "In all cases of this kind, much weight is due to the declaration of the defender; and, in the course of my experience, I have generally found that any little difficulty which may arise on the proof is remedied by a reference to the defender's declaration."

In *Patrick's* case, his Lordship remarked, "I wish the parties had been judicially examined in this case: it would have supplied many of the difficulties and wants in the case."

The mode of procedure which we now recommend is not unknown in the civil courts in continental states, whose rules for the investigation of facts and the ascertainment of truth are, in many respects, well matured. It is not very dissimilar to some proceedings in Chancery under interrogatories and answers on oath. The scheme is well worthy of the serious attention of jurists. Any change on the present procedure must be for the better.

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### THE MONTH.

*Business of the Courts.*—Since the commencement of the Winter Session, some improvement is observable in the business brought before the Court of Session. There may not be many new cases of a nature to excite public interest and attention; but there is a marked increase in the number of *bona fide* suits proper for trial in the Superior Courts. This result is attributable, we believe, to the reduction that has been effected in the Inner House Rolls; and also to a general tendency, which has begun to manifest itself amongst the profession, to press the cases forward for decision, instead of availing themselves of the forms of justice to protract the litigation. Practitioners may rely upon it, that clients will no longer submit to the old infliction of a "gude gangin' plea." With the option before them of commencing proceedings in the Sheriff Court, which at any rate holds out the promise of speedy justice, it is not difficult to foresee the result of the continuance of those dilatory methods that brought discredit on the practice of the Court of Session.

*Competency of Appeal in Cases below L.25.*—The public is indebted to the Great North of Scotland Railway Company for having raised the question, too easily assumed to be settled, as to the responsibility of Sheriffs for the due administration of the law in cases under L.25. In the appeal presented against that corporation at the Autumn Circuit Court in Aberdeen, the complaint was, that the Sheriff had refused to exercise his jurisdiction, he having sustained an objection to the defender's citation, the effect of which was to put the pursuer out of Court. The competency of the appeal was disputed, on the ground that the 22d section of the Sheriff Court

Act (16 & 17 Vict., c. 80) prohibits all review of Inferior Court decrees for sums below the value of L.25. There can be no doubt of the general understanding amongst the profession as to the purport of this enactment. It was universally believed that it deprived the suitor even of the scant measure of redress which was in use to be administered under the form of a Circuit appeal. But the Court held (and the distinction is good in logic, if not in law), that a removal for the purpose of enforcing the jurisdiction was not a removal in order to *review*. Being of opinion that the Sheriff had decided erroneously in declining the jurisdiction, they sustained the appeal, and remitted to that judge to proceed with the cause. This decision has given a blow to the doctrine of irresponsibility. But the form of appeal to the Circuit Court is so limited as practically to be valueless. An example of the sort of review to which the profession has been looking forward, is presented in the procedure clauses of two statutes of the last session, to which we proceed to call the attention of our readers.

*Examples of Appeal on a stated Case.*—By the Act for the Prevention of the Adulteration of Articles of Food or Drink (23 & 24 Vict., c. 84), the provisions of the English statute relative to appeals in magistrates' cases are made applicable to Scotland, as regards all convictions under this Act. As the clause in question may not have attracted the notice of our readers, we reprint it entire:—

“VIII. Any person who shall have been convicted by any Justices or Sheriff Substitute of any offence punishable by this Act, in respect of the selling of any article of food or drink which shall have been manufactured according to any process patented before the passing of this Act, either by the patentee or owner of the patent, or by any person carrying on his business or otherwise claiming under him during the continuance of such patent, may, instead of appealing to the General or Quarter Sessions of the Peace or Sheriff of the county, apply in writing within five days after such conviction to the Justices or Sheriff Substitute, to state and sign a case for the opinion of one of the Superior Courts of law thereon, in like manner as under the statute of the 20th and 21st years of her Majesty, chap. 43, he might have applied to the Justices to state and sign a case, and thereupon all such proceedings shall take place upon and in relation to such application, and all such provisions shall be applicable thereto as would have taken place upon and in relation thereto, and been applicable thereto, under the provisions of the said last-mentioned Act; and in Scotland, for the purposes of such appeal, the Justices or Sheriff Substitute may state and sign a case for the opinion of the Court of Session, in like manner as the Justices in England and Ireland may, for the opinion of the Superior Courts of law under the said Act, and the Court of Session shall have in relation thereto the like powers as the Superior Courts have under the said Act, and all the other provisions of the said Act shall be applicable to such appeals.”

The Herring Fisheries Act of the last session (23 & 24 Vict.,

c. 92), instead of incorporating the English Act, merely requires the convicting Justice or Sheriff to state the material facts of the proof in writing, if required; and declares, that the defender may thereupon appeal to the Court of Justiciary, in manner provided by the Heritable Jurisdictions Act. It will be observed, that the main feature of both enactments is the provision made for the ascertainment of the facts by means of a stated case; a formality which we believe to be essential to the success of any mode of summary review, more especially where no record is made up in the Inferior Court. The framer of these Bills, we presume, must have entertained the intention of instituting a competitive test of the qualifications of the Supreme Civil and Criminal Judicatories as Courts of Appeal; for the jurisdiction is divided between them with strict impartiality. We scarcely anticipate that appeals under either of those statutes will be so numerous as to offer anything like a fair trial of the system; and we would strongly urge upon the Lord Advocate the expediency of extending the benefit of the English Act to all Sheriff Court cases in which advocacy is at present excluded.

*The Shedden Case.*—Among the nine days' wonders of the season, the admirable appearance of Miss Shedden in the great family lawsuit of that name is conspicuous. Leaving to others to sing the eulogy of this intrepid debater, it may suffice for the present if we bring together a few points in the history of the litigation, which may serve to explain the effect of the pending proceedings.

Mr William Patrick, the respondent, was also the defender in the original action, which was decided so far back as 1810. Even at that time the case had attained considerable celebrity. It settled one or two knotty points in the law; among others, that an alien-born cannot be legitimated *per subsequens matrimonium*, although the parents are natural-born subjects of the Crown of Scotland. It was keenly contested both on the law and the facts in its various stages. Lord Brougham wrote his first and only appeal case on it, and was requested by Lord Eldon to edit a special report of the decision. But the most remarkable feature in the litigation was the attempt, made some ten years ago, to upset this decision of the House of Lords, on the ground that it had been obtained by fraud. This second case was also carried to the Court of ultimate appeal, with this result, that the action was dismissed; their Lordships holding that no case of fraud had been disclosed.

and that there were no grounds for imputing fraud, or for disturbing the decision. But their Lordships were pretty decided in the opinion that the decree might be set aside if a case of collusion could be proved; and as the decision went merely to the relevancy, it would seem that a second action of reduction is still competent.

The present application to the Court of Probate, under the Legitimacy Declarator Act, does not directly touch the succession or affect the family estate of Roughwood. The present question, it would appear, was not distinctly raised in the original action: it having been too easily assumed that Mr Shedden, the original defender, was not born in wedlock. The application having been unsuccessful, it is needless to inquire whether any steps could be taken for giving effect to the English decree, for the purpose of regulating this valuable succession, which has, doubtless, been the parent of many a heartache to the claimants on both sides.

*Pleas in Law.*—We direct attention to a letter in another column on this subject. Our own leaning is rather favourable to the requirement of strictness in pleading; and any method which would have the effect of amending the loose practice which prevails as regards the mode of shaping records, would meet with our support. As we understand the question of the validity of the general plea has been already raised for adjudication, we shall defer our comments till such time as we can have all the materials before us.

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## New Books.

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*The Bankruptcy Law of England and Scotland.* By H. GLASSFORD BELL, Esq., etc. etc.—*Expenses in Bankruptcy.* By GEORGE AULDJO ESSON, Accountant in Bankruptcy. Glasgow: James Maclehose. Edinburgh: Edmonston and Douglas.

*The Appellate Jurisdiction of the House of Lords, from the Courts of Scotland.* By JAMES ANDERSON, Esq., Q.C. Printed for Private Circulation.

THE past vacation has been unusually prolific of speculative treatises on law. In addition to Mr Fraser's work, which is noticed elsewhere in these pages, we have a sheaf of legal monographs, contributed to the Transactions of the Social Science Association, at their recent meeting in Glasgow. Two of these papers (of which we

prefix the titles) are deserving of notice from the intrinsic importance of the subjects treated; but the former has an additional claim on our attention, in respect that it conveys a variety of useful and interesting information on a subject which concerns the profession, and is not easily obtained elsewhere. We venture to affirm, that very few Scotch readers of the parliamentary debates have formed any definite conception as to the merits or demerits of the Bankruptcy Bill, which was to have been the great feature of the legislation of the last session. Expense heaped upon expense, and confusion worse confounded: such were the impressions we received from the discussion of its multitudinous details. In his paper on the subject, Sheriff Bell has explained, in a very luminous manner, the leading points of agreement and difference which are presented in a comparison of the Scotch and English bankruptcy systems. The large experience which the Lanarkshire Sheriffs have had in the administration of this useful department of the law, invests the opinion of any of those gentlemen with the weight of authority. Mr Bell, while bestowing a well-merited encomium on the Scottish system, discloses some facts connected with the working of the English bankruptcy jurisdiction of a startling character, which will, we hope, be duly pondered by those members of the mercantile community who are so anxious to embark on a career of wholesale assimilation. For example, we are informed, on the most reliable authority, that the expense of realizing an English bankrupt's estate amounts, on the average, to the snug little discount of *thirty-three* per cent. on the assets; the expenses in Scotland being, as Mr Esson informs us, only  $12\frac{1}{2}$  per cent. Our astonishment at the extravagant results of the English system vanishes when we reflect that the English Courts of Bankruptcy are not only self-supporting, but are made to maintain a judicial staff nearly equal to the Court of Session, and a whole army of sinecurists, in the shape of registrars, assignees, district and county registrars, taxing masters, accountants, deputy masters, etc., etc., etc. We observe that Mr Bell indorses many of the criticisms passed upon Sir R. Bethell's bill in the House of Commons, and insists on justice being brought home to every man's door by an amalgamation of the Bankruptcy with the County Courts. The Attorney-General objected to the frightful expense (something like L.100,000 per annum) which would be incurred by pensioning off the existing staff of officials; but we really do not see any necessity for making them pensioners. A public servant may be allowed to claim a life interest in his salary; but he has no right to object to any reasonable change in the routine of his duties, so long as these duties are not incompatible with his position. We say, therefore, make the existing Commissioners perform the circuit of the County Courts in their several districts as long as they continue to hold office; and, on their death or resignation, let the duty devolve upon the County Court Judge. Any routine duty requiring attention during the interval between

the Commissioners' visits could, in the meantime, be performed by the County Court Judge.

Some surprise has been manifested in Scotland at the opposition which the Attorney-General encountered in his endeavour to abrogate the old distinction between bankrupts and insolvents, traders and non-traders. The following passage contains the solution of the riddle:—

"In England, various acts, which are in themselves harmless or indifferent, are held to be acts of bankruptcy, if done 'with intent to defeat or delay creditors.' It is often, however, difficult to ascertain with what intent an otherwise indifferent act has been done; and the same presumption will not always arise in the case of a trader and non-trader. Thus, departing the realm, or remaining abroad—departing from one's dwelling-house, or absenting one's self from it—beginning to keep within house, conveying property, etc.,—are, in England, acts of bankruptcy, if done 'with intent;' and, in as far as traders are concerned, this test is perhaps fair enough, for a trader cannot, in ordinary circumstances, remain furth of the realm for any long period, or absent himself from his ordinary dwelling-place, or keep exclusively within it, or gratuitously convey away property, without giving rise to the presumption that he is about *cedere foro*. But the same observation does not apply to many classes of non-traders; so that when the Attorney-General proposed simply to alter the word 'trader,' as contained in the Consolidation Act of 1849, into 'any debtor,' it became evidently necessary either to make a distinction in what were to be considered acts of bankruptcy, or to modify materially the existing Acts. This last course was adopted, but, in the opinion of some, not to a sufficient extent. Country gentlemen and others took alarm, and maintained that some of the acts still retained as tests of bankruptcy might be so in a trader, but did not admit of the same construction in the case of a non-trader. It will not be difficult, it is conceived, to obviate this objection; and, as the obtaining an adjudication of bankruptcy is really a privilege to an honest insolvent, it is to be hoped that the law of England will be assimilated in this respect to that of Scotland, by extending the provisions of a Consolidation Act to all and sundry."

The most objectionable feature in the Scotch system is the facilities which it affords to bankrupts for obtaining their discharge. With the following judicious observations on this point, we may appropriately close our notice:—

"In Scotland, if the creditors accept of a composition, the bankruptcy is thereby brought to an end, and the bankrupt, on emitting a declaration or oath that he has made a full and fair surrender, is entitled to his discharge from the Court. If the estate is wound up by a division of the whole assets among the creditors, the bankrupt may apply for his discharge at different periods within the two first years of the bankruptcy, provided he obtains the concurrence of the statutory majority of creditors applicable to each period; and after the lapse of two years he may apply without any concurrence. If no appearance is made in any of the above instances to oppose the discharge, the Lord Ordinary or Sheriff is bound to grant it; but if there be opposition, the judge may either grant, refuse, or suspend consideration. There is certainly an impression abroad in Scotland that a bankrupt sometimes obtains his discharge too easily, which is no doubt attributable to the fact that, when he can command the requisite concurrence, or keep back opposition, the Court has no discretion to refuse—in conformity with the favourite and popular principle of our bankrupt law, that the creditors themselves should have a large control. There are ample opportunities for opposing discharges if the creditors choose to avail themselves of them. The initiative is with them; but although a great cry is raised when a glaring case is first brought to light, the bankrupt has commonly only to wait



for a month or two till the indignation cools, and he will then be pretty sure to find that the creditors have made up their minds to the loss, and resolved to devote no further time or expense to the matter. In very bad cases, if a friend can be got to help the bankrupt to pay a little larger composition than the estate will show, there is generally little difficulty in getting through with his discharge. The judge's duty being only ministerial, it is a notorious fact that the worst cases which have recently appeared in the Court at Glasgow have been wound up without opposition. The simple desire for justice is not a sufficiently strong motive to induce a creditor to take up an antagonistic position with no prospect of personal advantage, and a certainty of incurring some expense. The more entirely that the assets have disappeared, the more likely is it that the estate will be left to itself. But it is clear that creditors should not be allowed to condone a fraudulent bankrupt, and it might be an improvement to make it a part of the duty of a public officer to inquire, in every case, into the conduct of the bankrupt, with power, not only to negative his discharge, but to cause the institution of a criminal prosecution when such was necessary."

Mr Anderson's pamphlet on the Appellate Jurisdiction will be read rather from the interest attaching to his opinion, than for the merit of any suggestion it contains. His creed is that of an optimist; the object of his adoration, an infallible House of Lords. We believe that at the present time the law of Scotland is very admirably administered in the supreme judicature; but it is not so many years since their Lordships sat self-condemned by the Report of a committee of their own House. Mr Anderson is against the admission of a Scotch judge into the House of Peers; and, if we remember rightly, his evidence before the Lords' committee was in consonance with his present opinion. An opposite opinion, however, was expressed by most of the witnesses of eminence who were examined, including the present Lord President of the Court of Session, and the Lord Justice-Clerk, the Lord Advocate, and Mr Roundell Palmer; and their opinion in favour of the creation of a Scotch Law Lord was adopted by the committee. It is quite in vain to argue as if the Scotch Peer would sway the deliberations of the House, and that the public confidence in its decisions would be weakened. The example of the Privy Council proves the contrary. It is a part of the statutory constitution of that court, that it should always contain a salaried Indian judge as one of its members; and although Sir Edward Ryan's services were very highly appreciated in the Council, yet, in point of fact, the judgment of the Court has most frequently been delivered by Lord Kingsdown, or one of the Chancery judges; and, as Mr Palmer remarked, it would be contrary to all experience to suppose that, in case of a difference of opinion, that of the Indian judge would necessarily prevail.

The only obstacle to the appointment of a Scotch Law Lord is the difficulty of finding a lawyer of sufficient fortune to justify his undertaking the burden of a hereditary peerage; nor do we see how this difficulty is to be obviated, except by resorting to the alternative of a life peerage, or a transference of the appellate jurisdiction to the Privy Council.

Mr Anderson, however, proposes to infiltrate some Scotch law

into the House by the better education of the class from which its members are usually recruited. He looks forward to a halcyon age, when English counsel will be able to pass examinations in Erskine, and when the Advocates' Library will be the scene of oracular utterances on "powers appendant and in gross." He complains that the lawyers of both kingdoms studiously abstain from acquiring a knowledge of the laws of the neighbouring territory. With all deference to the author, this is mere moonshine. The English bar practising in the House of Lords do their best, we presume, to acquire a competent knowledge of Scotch law. We on this side of the Tweed give what time we can spare to the perusal of the *English Reports*; but we cannot expect to master the technicalities of a system which can only be successfully studied by those who are engaged in its practical administration. It is fortunate that there are men, like Mr Anderson, who have had the opportunity of acquiring proficiency in both departments of jurisprudence. Yet, while we acknowledge the ability and acquirements of that gentleman, we would prefer, on a pure question of Scotch law, to take the opinion of an advocate practising in Scotland; and we suspect that Mr Anderson would be inclined to pay but little deference to the opinion of a Scotch judge on a matter of English law, if the opinion in question happened to differ from his own. The principle of treating foreign law as matter of fact is perfectly sound. A Stowell could rise superior to it, when occasion required; but it is valuable as a bulwark against the empiricism of second-class publicists.

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*Address on the Art of Pleading*; Delivered to the Glasgow Legal and Speculative Society. By the Right Hon. JAMES MONCREIFF. London and Glasgow: Richard Griffin & Co.

THE Legal and Speculative Society have shown their appreciation of the excellent advice given to them last September, by publishing the Lord Advocate's address to their body. It was not possible that one who has attained so well-merited a reputation as an eloquent and artistic speaker, could undertake to communicate the results of his forensic experience without dropping some hints that deserve to be rescued from oblivion. In the address before us, the Lord Advocate seems to have judiciously abstained from laying down any rules for the acquirement of a good style; and has contented himself with directing the attention of his auditory to the most important points which lead to the attainment of success in pleading.

Viewed in this light, the subject is one that may be studied with advantage by the practising pleader as well as by the student; and we venture to say, there are few even in the higher walks of the profession who may not find in these pages matter calculated to stimulate reflection, and to suggest improvement in their professional avocation. It is instructive to notice that the two points on which the learned author most strongly insists, as the corner-stones

of every skilfully constructed legal argument, are precisely those which, in popular estimation, are most inimical to the forensic art. They are—(1) careful arrangement, combined with perfect accuracy in the statement of facts; (2) the doing justice to the argument of the opposite party. We have frequently heard the remark from those who have been professionally acquainted with the great pleaders of our time, that nothing was more surprising than the perfect mastery which these intellectual gladiators had acquired over all the facts of an intricate case. The habit of acquiring rapidly, and mentally retaining, the details of a case, is, doubtless, to be learned by practice, like every other accomplishment. If not of spontaneous growth, it is speedily forced upon the barrister; because the judges, who are themselves masters of the art, are seldom very tolerant of blunders on the part of those whose duty it is to inform the mind of the Bench. As to practice in the arena of argument (the other great field of forensic controversy), there is much force in the following observations, in which the Lord Advocate conveys a graceful compliment to an old political rival, and a master in the art which the lecturer has very successfully essayed to expound:—

“ In the next place, go straight up to your adversary’s argument. It was told to me of the late John Clerk, who was in his time probably the most acute and boldest pleader at the bar, that he despised greatly some of his cotemporaries who went round about the adversary, and never fairly met him, but endeavoured to draw away the attention of the Court from the strength of the argument. His advice to his younger friends was,—Go straight up to your adversary’s argument; meet it if you can, and if you can’t meet it, why, then, lose your case. Again, never misstate the argument of your adversary in order to gain an advantage for your own. Rather state it strongly; and here, I think, I may quote, without offence, the practice of a great leading pleader now on the bench—I mean the present Lord Justice-Clerk, who, in legal dialectics, was probably as accomplished a man as the bar of Scotland ever produced. One of his great merits was, that he never misstated his adversary’s argument; indeed, he very often stated it more strongly than his adversary had done, and put it in the strongest and clearest light, just in order that his triumph might be the greater when, after having presented it in its full force, he was enabled to crush it into atoms. The victory is not worth winning if you have not stated fairly the argument of your adversary.”

## Correspondence.

### PLEAS IN LAW.

*To the Editor of the Journal of Jurisprudence.*

SIR,—Your readers who practice before the Court of Session are aware of the custom which now so universally prevails, in the preparation of actions to annex to the summons, instead of detailed and articulate pleas applicable to all the points of law which are involved in the case raised, a general plea to the effect that, in the circumstances condescended on, the pursuer is entitled to

decree in terms of the conclusions of his action. In a large majority of the actions which are brought into Court, I believe this is the manner in which the affirmation or proposition of the law applicable to the case is set forth in the first instance; and when an action is undefended, or when there is decree in absence, of course the matter goes no further. When, however, defences are lodged, and when it is seen what the points of law to be really raised are (and it falls to the party sued, not to the party suing, to raise such points), the practice is for the party suing, on adjustment or revival of his case, to put forward, with more or less amplitude, the special pleas on which he considers it necessary to rest his case with reference to the points so raised. At the same time, in almost all cases, both parties fortify themselves, over and above their special pleas, with a general plea or pleas, to cover points either unforeseen or too trivial to be specially set forth.

But it has recently been announced from the Bench, in one or more departments of the Court, that they have resolved to hold that the general plea above noticed is not a sufficient plea in law, and that actions brought into Court, in which the plea is stated in that form, will not be sustained.

Now, I am humbly of opinion that this intimation is somewhat uncalled for, and that it will be attended with serious practical inconvenience, without any corresponding advantages.

In the first place, I cannot concede that the general plea, as usually stated, or at least as it may be stated, with very slight verbal alteration, is not a validly stated plea. A large majority of the profession must consider it to be so, otherwise they would not use it; and the Bench have not authoritatively decided to the contrary, for the question has never yet been raised in argument.

In the second place, supposing the general plea to be stated in a competent shape, it is of the utmost convenience, and therefore of great practical advantage, that the matter should be left on its present footing. It may be said that, in its present shape, it gives no sufficient notice or intimation to the party sued of the grounds of law on which the party suing founds his conclusions. Grant that it does not do so in itself, the party sued has been put by the condescendence, which precedes the plea, in possession of the whole facts and circumstances under which he is brought into Court, and of the claim arising against him out of these facts and circumstances. If they are true, and if they are relevant and coherent, he cannot fail to perceive how far or otherwise they affect him. If they are not true, it is for the party sued to say so. If they are not relevant and coherent to sustain the claim made against him, it is equally for him to point out how they are not so. Then is the time for the party suing to state fully the pleas in law on which he may then find it necessary more specially to found. These pleas come then to be the reply in law of the party suing to the pleas in law proposed in behalf of the party sued, and on which both parties are to join issue in so far as regards the law of the case.

It may be said, that in the point of view above contended for, a general plea in law appended to the summons is of no value whatever; and that, if it is always to be in the same form, it might as well be dispensed with. I do not deny that the view here taken is open to this observation, but I think, notwithstanding, that a general affirmation of the right of a party pursuing is in place at the end of his summons and condescendence. In any point of view, it gives form and completeness to his case; and it serves, besides, as a sort of *matrix*, comprehending and including the special pleas to be afterwards raised in it, if such shall be found necessary.

Let me also inquire, how is it possible practically to work out the requirements of the statute in any other way? In an action involving numerous and complicated facts, if special pleas are required in the first instance, it would be necessary to state, in a separate and articulate proposition, in so far as bearing on the conclusions of such action, every legal inference, direct and alternative, arising from each separate circumstance, or set of circumstances, from beginning to end of the whole detail,—some of these propositions being probably of the

simplest and most axiomatic kind. Take, for example, such a case as that of A pursuing B for the price of a horse sold. There would probably be required, besides a statement of the facts,—which, one would think, is all that B could justly be entitled to expect in the first instance,—one legal proposition, that by such and such facts a contract of sale was constituted between the parties; another proposition, that A having fulfilled his part of such contract, B was bound to fulfil his; a third, that B having failed to do so, he was liable, etc., etc., and so on. If it can be maintained that to impose such a duty on A, in seeking the aid of a court of law to recover his just claims in a manner consonant with the dispensation of justice for the convenience of the public, can be for the benefit of B, or of any other person except writers' clerks and paper-makers, we undertake to surrender our argument.

If parties brought into Court in the position of defenders were in any way aggrieved by the practice which has prevailed since the passing of the Court of Session Act of 1850 (under which this question arises), they would undoubtedly have discovered this for themselves, and have made it a ground of defence or objection to the action; yet, strange to say, in no case, so far as I can learn, has such a defence or objection been seriously urged or maintained.

You are aware that in some, though not in very many, cases, records have been adjusted and closed without any other plea than the general plea being stated or inserted on behalf of the pursuer. It may be superfluous to observe that this is a course which I do not attempt to defend. But, with regard to bringing actions into Court, I think that very different considerations apply; and that, keeping in view the attainment of justice, the advantage of the public, and the convenience of the profession, the present practice ought not to be interfered with.—I am, etc.

S.

#### REPRESENTATION IN LEGITIM.

EDINBURGH, 20th November 1860.

SIR,—I beg, through you, to call the attention of the profession to a subject which appears to be well worthy of the attention of our practical law reformers, and which, I believe, only requires to be ventilated in order to an improvement being effected upon the existing state of matters.

I refer to the subject of representation, or rather the present non-representation, *quoad legitim*.

By the recent Intestacy Act, 18 Vict., c. 23, representation in moveables was introduced, and I believe that that meets with universal approval; but the Act is so limited by the interpretation clause as not to apply at all to *legitim*. Why should this be so? Assuming that our rule of law, which puts it out of the power of a father to test upon the *legitim* fund to the prejudice of his children, is right, then it appears to me that there is more reason for applying the principle of representation to the *legitim* fund than to the dead's part.

As our law at present stands, grandchildren by a predeceasing child may succeed to a portion of the dead's part, which the grandfather would have had it in his power to have put past their parent; but, strange to say, they do not succeed to that which the grandfather would have had no power to put past their parent, had that parent survived. This seems an anomaly, but which I would fain hope ere long to see removed, by the introduction of representation *quoad the legitim* fund. It will be observed that this would not alter the present state of the law as between parent and child, but would only introduce a more equitable distribution of the *legitim* fund as between immediate children and grandchildren by a predeceasing child.

It seems desirable, also, to keep the subject of the law of deathbed from sleeping, that it may the sooner become the subject of its long sleep.—I am yours, etc.,

ITA EST.

# Digest of Decisions.

## COURT OF SESSION.

### FIRST DIVISION.

C. D. YOUNG'S TRUSTEE *v.* JOHNSTON.—*Nov.* 14.

#### *Compensation—Process.*

THE defender, William Johnston, contracted in April 1858 with the bankrupts, C. D. Young and Co., for two steam-engines at L.220. He received them on 2d June, and on 17th June the insolvency of C. D. Young and Co. was declared, at which time this firm was a debtor to the defender under two bills due on 20th July—one for L.123, 14s., and the other for L.94, 14s. The defender proposed to set off the value of the bills and charges thereon against the price of the engines, and to rank for the balance in the sequestration. The pursuer, who is trustee on the sequestrated estate, refused his claim, and raised the present action of reduction, which is laid on the Act 1696. An issue, which was not an issue of reduction, was proposed and disallowed by Lord Kinloch, who indicated an opinion that there was no issuable matter in the record. In this view the Court concurred; but there was a difference of opinion as to whether the case could be at once dismissed. Lord Ivory thought the action could not be dismissed, and that on a report by the Lord Ordinary under 13 & 14 Vict., c. 36, sec. 38, the only question competently before the Court was, whether there was issuable matter or not. Lord Deas thought it quite competent to go farther, and dismiss the action, but unsafe to do so in the present case; and in this view the others concurred. The Court accordingly disallowed the issue; and having regard to the structure of the record, find that no issue can be granted under it, and remit to the Lord Ordinary to proceed with the cause.

T. D. DOUGLAS *v.* TURNER *et al.*—*Nov.* 15.

#### *Bill of Exchange—Prescription.*

In 1837, Allan George Bogle, then a banker in Florence, borrowed the sum of L.1000 from T. D. Douglas and others, for which he granted his promissory-note, and also an assignation in security of all right and interest belonging or competent to him in the succession of Allan Bogle, his father, whether by marriage-contract, will, or otherwise. The original promissory-note for L.1000 was twice renewed by Allan George Bogle, the last renewal being in 1840. In 1843, A. G. Bogle died, and Mr Blake is his surviving executor. The assignation in Mr Douglas' and others' favour was declared to be in security only, and the grantees bound themselves to denude when they were fully relieved by payment of the loan. A multiplepinding having been raised for the distribution of Allan Bogle's estate, the assignees claimed in it on the fund *in medio* so far as falling to Allan George Bogle. Blake, Allan George Bogle's executor, opposed their claim, on the ground that the original promissory-

note had been discharged, and the renewal notes had been extinguished by the sexennial prescription. The Lord Ordinary (Neaves) sustained the claim, holding that the assignation in security subsisted for the loan for which the several notes were granted, and therefore that prescription could not be pleaded; and the Court unanimously adhered. Lord Deas wished it to be understood that the Court went entirely on the terms of the assignation, and not on the difficult questions under the 12 Geo. III., noticed by the Lord Ordinary. The assignation was sufficient evidence of the debt, requiring to be met by allegation and proof of payment or extinction, which it had not been. It subsisted for forty years.

INNES v. REID'S EXECUTORS.—Nov. 17.

*Triennial Prescription—Admission.*

The effect of certain letters of the advocator after the course of the triennial prescription is the matter of dispute in this advocacy from Banffshire, at the instance of Charles Innes, lately vintner, Charleston. The pursuers, the executors of the late Alexander Reid, Esq., of Macallan Distillery, seek to recover from the advocator L.34, 17s. 0½d., being the alleged balance of an account of about L.145 for whisky, ending 6th January 1844. In 1846 the defender's affairs fell into disorder, and he offered a composition of 6s. a pound to his creditors. The pursuers believe that Mr Reid agreed to accept of this composition, but deny that the "transaction was completed," and deny that the composition was paid. In 1847 Mr Reid died, and the agent for the pursuers applied to the defender for payment of the account now sued for. In March 1848 he wrote, denying vaguely the accuracy of the account, and on 30th September 1848 he wrote as follows:—"I hade a letter sometime ago from you about the leat Mr Read's account, which is not corect. I am charged for about 35 pounds, and I can prove I am not due twenty. The number of gallons is corect; but I am charged about 1s. 6d. per gallon more than the agreed prise, and lekways I am charged a long time back with this 1s. 6d. on the gallon. I can show a balance between Mr Read and I, and his own signature to it, which the overcharge on the whisky for such a length of time makes a difference between us; and lekways I have ane account against Mr Read and the Doctor, I think upwards of 8 £ pounds; and I have also a letter from Mr Read's own hand accepting of my offer of compositon, whatever it wase, which was addressed to Mr Fleming, and is now in my posison. So I think there will not be a great dale to do if once we had a ballance; and then I must have a short time to pay. I have a few of my divdends to settle yet, which I will do; but I must have a little time to do it. Lek a stupid fool as I was, I agreed to pay the expinces, which has ruined me, or I would have been clear long ago. I was oblidded to sell of my shop, and lekways to give over any other little thing which belonged to me for to get cash to settle as fare as I have gone. I have had your letters from Mr Fliming about your account; but I hope you will give me a little time to pay it, and I will pay you what is a fair thing onstly and without very little troubell; but if you and others pushes me at, I will neither be able to pay the principal or expices, so I hope you will give me a little time for your sum, and I will feel verry grateful to you for it, and pay you onestly; and if you and others puts on ex-

pinces on me, you shall have yourselves to bleam, and you will see where you will land." These letters were written after the three years; and after more than another three years, on 19th April 1853, he wrote concerning the debt that he considered it settled, and more, that he held a letter from Mr Reid, "saying he is to asept of my composiso whatever it should be." On the case being advised, the Lord President, after stating the facts of the case, said there could be no doubt that the letters proved that the furnishings had been made, and that something was due by the defender; but the defender contended that in his letters he stated objections to the debt which were intrinsic qualifications of the admissions therein made, and which must be given effect to. He (the Lord President) had no difficulty as to any of the objections stated by the defender, except that in which he said, "I am charged about 1s. 6d. per gallon more than the agreed price." Now, in order to be effectual, a qualification must be as unambiguous as the admission. Otherwise, farther investigation was indispensable; but the statement just noticed didn't set forth the exact price agreed on: it didn't even lead to that by necessary arithmetic. It only went to this, that *about* 1s. 6d. per gallon too much had been charged him. That was so ambiguous, that all the effect it was entitled to—and it had received that—was to allow of farther proof. On the proof which had been taken, the Sheriffs had rightly decided against the defenders. The case of *Dowdy and Graham*, 8th December 1859, relied on by the defender, had no bearing on the case, for it did not relate to a question of prescription. The other judges concurred. The Court, therefore, refused the advocacy with expenses.

*Pet.*—SMITH BROTHERS AND CO.—*Nov.* 20.

*Recall of Sequestration*—*Stat.* 23 & 24 *Vict.*, c. 33.

This was a petition by Smith Brothers and Co., manufacturers, Heywood, Lancashire, for the recall of the sequestration of John Rostron, designing himself lately residing at Sunnyside, Cheetham Hill, Lancashire, presently residing at 143, Princes Street, Edinburgh. R. Rostron was sequestrated in Scotland in June 1860. His concurring creditor was Betty Warburton, his maid-servant, whose claim was for L.60 of arrears of wages. The principal creditor was the bankrupt's aunt, Miss Betty Rostron, residing at Holcombe, to whom he was due L.800. The next largest creditors were the petitioners, their debt being about L.363. The petition for a recall is presented under the recent Bankruptcy Amendment Act, 23 & 24 *Vict.*, c. 33, all the creditors being in England, and the bankrupt having no assets. The Lord President was clearly of opinion that this was a case in which the Court should recall the sequestration in the exercise of the discretion conferred on them by the Bankruptcy Amendment Act. The other judges concurred; Lord Ivory observing, that the present was a stronger case than that contemplated by the statute; for not only a majority, but the whole, of the creditors were resident in England. On the motion for expenses,

**LORD IVORY**—At the date of the sequestration, it was, under a decision of the Second Division, a valid sequestration. The bankrupt, therefore, could not be made liable for the expenses of the petition itself, but only for that incurred in consequence of his opposition to it.



## SECOND DIVISION.

CHRISTINA McLAREN OR SHARPE v. HUSBAND.—Nov. 14.

*Review in Petitions—Stat. 20 & 21, Vict., c. 56.*

After due intimation and service of a petition for the appointment of a *curator bonis* to a lunatic, the Lord Ordinary on the Bills—there being no opposition—made the appointment as craved. Mrs Sharpe, upon whom the petition had been served, but who had made no appearance, now presents a reclaiming note against the Lord Ordinary's interlocutor. The competency of this note was disputed on the ground that she, not having appeared before the Lord Ordinary, was not entitled to reclaim. The Court sustained the competency. They held that, in cases of this nature, where application is made to the equitable jurisdiction of the Court, which required to be itself satisfied before making the appointment, the interlocutor pronounced is on the merits, whether parties appear or no; and that therefore any party having "a lawful interest to reclaim," may do so in terms of the 6th section of the 20 & 21 Vict., c. 56.

DREW v. DICK.—Nov. 16.

*Reponing Note—Stat. 13 & 14 Vict., c. 36.*

This was a reclaiming note (1) against an interlocutor of the Lord Ordinary closing the record, and (2) against a decree by default, in consequence of the defender refusing to debate on the ground that he had reclaimed against the interlocutor closing the record. The competency of the reclaiming note was objected to in respect that the record was not appended to the note. To this it was answered, that the case having begun before 1850, the regulations of the Act 1850 did not apply; and that the record not being authenticated by counsel, it was not duly closed. The Court held the reclaiming note incompetent as regards the first interlocutor, in respect that the record was rightly closed, the case having been conducted without objection under the regulations of the Act 1850, and that the record being closed, it must be appended. As regards the second, the decree by default, though a reclaiming note was not the proper form, the Court were disposed to look upon it as a reponing note, which does not require to have the record appended.

Pet.—MAJOR-GENERAL STUART *et al.*—Nov. 20.*Evidence—Foreign Record.*

This was a petition by Major-General Stuart, who, along with Lady Elizabeth Moore, had been appointed guardian of the Marquis of Bute by the Court of Chancery, for an order against the said Lady Elizabeth Moore for delivery of the said Marquis, in conformity with an order of the Court of Chancery. A discussion took place as to the authentication of copies of the Chancery proceedings produced by the petitioner, who contended that these being the regular official copies, the authenticity of which had not been denied by the respondents, they must be taken as unchallenged. The Lord Justice-Clerk—Even though the respondents admitted them, the Court has a duty to the pupil which would prevent them taking the admission. The Court pronounced an interlocutor allowing the petitioner a proof of his averments.

MAXWELL'S TRUSTEES v. JOHNSTON.—Nov. 20.

*Effect of Decree on Third Parties.*

Messrs Grieve, Binnie, and Reid, the reclaimers, are the trustees of

the late Mrs J. M. Vanshall or Maxwell. One of the purposes of the trust was the payment of the unpaid debts of W. H. Graham, "said debts being always legally vouched." The present action was raised by Johnston against Graham, and the said trustees conjunctly and severally, for payment of a debt due to him by Graham. Decree in absence was allowed to go out, and the present reclaiming note was brought by the trustees to have themselves reponed, and the interlocutor recalled. Lord Justice-Clerk: I am of opinion that, in the circumstances of this case, the trustees should be reponed against this interlocutor *in toto*. I do not dispute that there may be a right in the pursuer to obtain decree in absence against Graham, but I think we are bound in the circumstances to protect the trustees against a decree in absence against them. They are in a different position from Mr Graham. They are bound to pay Graham's debts; but as Graham has not right to the fee of the residue, they have a right to see that alleged debts are well founded. It is possible that Graham might combine with the pursuer for the purpose of getting this money out of the trust; or Mr Graham might, for his own purposes, admit the debt, and so make it a good claim against the trustees. If the pursuer said that his object was to attach property belonging to Graham himself, he might insist on getting decree in absence, and for this purpose he may get a decree afterwards. But to allow this decree for the purpose of founding an argument against the trustees, does not seem to be proper. Lord Cowan and Lord Benholme concurred.

**BARGADDIE COAL COMPANY v. WARK *et al.*—Nov. 22.**

*Suspension—Landlord and Tenant.*

This is a suspension of a charge for rent on a written tack of minerals, with a clause of registration. The ground of suspension is, that the seams of coal, being quite unworkable at a profit, and having been so from a period prior to Martinmas 1859, the lease founded on is at an end, and no rent is due under it. The Lord Ordinary (Jerviswoode) refused the note, and the Court, without calling upon the respondent's counsel, adhered; holding that so long as the lease existed with a clause of registration, and the tenant was in possession under it, they could not in the present suspension immediately relieve him from his obligation for the rent. They guarded themselves from saying what course they might have adopted if the tenant had carried his protest so far as to have given up possession. The question raised by the suspenders' plea was extremely important and entirely new. It did not, however, require to be decided here.

**GRAHAM AND OTHERS v. MRS GRAHAM'S TRUSTEES.—Nov. 22.**

*Trust—Expenses.*

By antenuptial contract, Mr and Mrs Graham had conveyed to themselves in liferent, and to their children in fee, their whole moveable estates. Mrs Graham died on the 8th of January 1858, after having, on the 31st of January 1845, executed a trust conveyance in favour of the defenders of certain policies of assurance belonging to her before marriage, some of which had become payable during her life. The purposes of this trust were at variance with the provisions of the marriage contract. Mr Graham, accordingly, for his own interest as liferenter, and as administrator in law for his children, brought the present action of reduction to have this deed set aside. Mrs Graham's trustees resisted

this, on the ground, *inter alia*, that the policies had been effectually and validly conveyed to them by Mrs Graham during her life, so that they were no longer part of her estate at the date of her death, and did not fall under the marriage contract. The Lord Ordinary having decided against the defenders, this reclaiming note was brought by the defenders, to be allowed their expenses out of the trust funds. The Lord Justice-Clerk: This is an important question. The claim of the trustees here is an entire perversion of the ordinary rule that trustees are entitled to their expenses in defending a trust-deed. That is a sound rule in the general case. This does not fall under it. The deed of 1845, in so far as it came into operation in her lifetime, might be competent; but after death it is proposed that it shall receive effect in regard to funds which, at the date of her death, were in the hands of these trustees under a trust which she might have recalled at any time. The Lord Ordinary held this deed to be a contravention of the marriage contract, and it was so held by the creditors in the marriage contract, in a question between these creditors and the parties who have been seeking to defeat them. Indeed, I do not see why the pursuers should not have got expenses. The fact of the defenders being trustees does not affect the question. I am bound to consider the position of the successful parties. They are not bound to pay the expenses of parties who are wrongfully opposing them out of their own proper funds.

MOFFATS v. UNDERWOOD.—Nov. 23.

*Issue—Expenses.*

This case came up on adjustment of issues. The case of the pursuers, as laid upon record, substantially is, that the defender, who, lawfully or unlawfully, had in her possession certain deposit-receipts belonging to the late Mr Anderson, and endorsed by him, went to the bank, and, without his authority, uplifted the sums in these receipts, and appropriated them to her own use. The issue proposed by the pursuer was, whether the defender uplifted and received the sums, and is indebted and resting owing? The defender maintained that such an issue was not appropriate or suitable to the case as averred, and that wrongful appropriation must be put in issue. The Lord Ordinary held that the defender's contention was right; and the Court to-day were of the same opinion, and adjusted an issue in which the words "wrongfully appropriated" were substituted for "received." On the motion for expenses, Mr Young contended that the adjustment of issues, being merely a proceeding, and a necessary proceeding, in the cause, and no point in the case being thereby decided in favour of either one side or the other, payment of expenses should only be ordered as a penalty for improper and unreasonable controversy. It was important to have this matter put on a satisfactory footing. The Lord Justice-Clerk said that it was a mistake to suppose that the Court, in awarding expenses, inflicted a penalty. The procedure provided by the Act was, that the Lord Ordinary should report issues, if parties could not agree. But if the issue adjusted in the Inner House could have been got by the party before the Lord Ordinary, and he refused to take it, and incurred expense by his opposition, he must, in the ordinary case, pay that expense, just as if he had come with a reclaiming note.

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# PUBLIC GENERAL STATUTES

RELATING TO SCOTLAND,

PASSED IN THE

TWENTY-THIRD AND TWENTY-FOURTH YEARS

OF THE REIGN OF HER MAJESTY

QUEEN VICTORIA.



Printed by Authority.

EDINBURGH:

T. & T. CLARK, LAW BOOKSELLERS, GEORGE STREET.

GLASGOW: SMITH AND SON. ABERDEEN: WYLLIE AND SON.

LONDON: STEVENS AND SONS.

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MURRAY AND GIBB, PRINTERS, EDINBURGH.

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ANNO VICESIMO TERTIO

VICTORIÆ REGINÆ.

CAP. XIV.

*An Act for granting to Her Majesty Duties on Profits arising from Property, Professions, Trades, and Offices.*—[3d April 1860.]

Most Gracious Sovereign,  
WE, Your Majesty's most dutiful and loyal Subjects, the Commons of the United Kingdom of *Great Britain* and *Ireland* in Parliament assembled, towards raising the necessary Supplies to defray Your Majesty's Public Expenses, and making an Addition to the Public Revenue, have freely resolved to grant unto Your Majesty the several Rates and Duties herein-after mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. There shall be charged, collected, and paid for One Year, commencing on the Sixth Day of *April* One thousand eight hundred and sixty, for and in respect of all Property, Profits, and Gains mentioned or described as chargeable in the Act passed in the Session of Parliament held in the Sixteenth and Seventeenth Years of Her Majesty's Reign, Chapter Thirty-four, either by Assessment, Contract of Composition, or otherwise, the following Rates and Duties ; that is to say, upon the annual Value or Amount of any Property, Profits, or Gains (except Property, Profits, and Gains described as chargeable under Schedule (B.) of the said Act) the Rate or Duty of Tenpence for every Twenty Shillings of the annual Value or Amount of all such Property, Profits, and Gains respectively ; and for and in respect of the Occupation of Lands, Tenements, Hereditaments, and Heritages described as chargeable under Schedule (B.) of the said Act, the Rate or Duty of Fivepence in *England* and Threepence Halfpenny in *Scotland* and *Ireland* respectively for every Twenty Shillings of the annual Value thereof.

Grant of  
Duties on  
Property,  
etc. for  
One Year.

II. The Duties hereby granted shall be assessed, raised, Duties to

be assessed and raised under Provisions of former Acts. levied, and collected under the Regulations and Provisions of the said last-mentioned Act and of the several Acts therein mentioned or referred to, so far as the same are or may be applicable, consistently with the express Provisions of this Act; and all the Powers, Regulations, and Penalties of the said Acts shall, so far as aforesaid, be applied, enforced, and put in execution with respect to the Duties granted by this Act.

The Sums assessed under certain Schedules for the last Year to be taken as the annual Value for this Act. III. The Sum charged as the annual Value of any Property, Profits, or Gains in the several and respective Assessments made under Schedules (A.) (B.) (D.) and (E.) of the said Act for the Year ending on the Fifth Day of *April* One thousand eight hundred and sixty, shall (except as to Railways and otherwise, as herein-after provided) be taken as the annual Value or Amount of such Property, Profits, or Gains for the Year commencing on the Sixth Day of *April* One thousand eight hundred and sixty; and the Duties granted by this Act shall be computed and charged according to such annual Value or Amount, and shall be collected, levied, and paid for the said Year commencing on the Sixth Day of *April* One thousand eight hundred and sixty, subject, nevertheless, to be increased, abated, or discharged in like Manner as the Assessments made for the Year ending on the said Fifth Day of *April* One thousand eight hundred and sixty: Provided, whenever it shall appear that any Property, Profits, or Gains chargeable under this Act have not been charged by the Assessments made for the said last-mentioned Year, such Property, Profits, and Gains shall be assessed to the Duties granted by this Act, under the Provisions of the said several Acts applicable thereto.

Property, etc. not charged for the last Year to be assessed under this Act.

Where since the last Assessment Property has been divided, Proportions of the Tax to be settled.

IV. If since the making of any Assessment under Schedules (A.) and (B.) for the Year ending the Fifth Day of *April* One thousand eight hundred and sixty, the Lands thereby charged shall have been divided into Two or more distinct Occupations, the Commissioners for General Purposes shall, on the Appeal of the Parties interested respectively, settle and adjust what Proportion of the Duties granted by this Act under the said Schedules shall be paid or borne by each Occupier; and the Amount apportioned on the respective Parties shall be collected and levied in like Manner as an original Assessment.

Commissioners for Special Purposes to assess Railways; V. No Assessment shall be made under this Act by the Commissioners for General Purposes in respect of the annual Value or Profits and Gains arising from any Railway, but in lieu thereof every such Assessment shall be made by the Commissioners for Special Purposes, and upon the Value or Profits and Gains for the Year ending the Fifth Day of *April* One thousand eight hundred and sixty, and the said last-

mentioned Commissioners shall notify the Assessment to the Secretary or other Officer of the Company upon which the same shall be made, and the Amount of such Assessment shall be paid, collected, and levied in like Manner as any other Assessment made by the said Commissioners for Special Purposes.

VI. In like manner as aforesaid the Commissioners for and also the Persons employed by Railway Companies. Special Purposes shall assess the Duties payable under Schedule (E.) in respect of all Offices and Employments of Profit held in or under any Railway Company, and shall notify to the Secretary or other Officer of such Company the Particulars thereof, and the said Assessment shall be deemed to be and shall be an Assessment upon the Company, and paid, collected, and levied accordingly; and it shall be lawful for the Company or such Secretary or other Officer to deduct and retain out of the Fees, Emoluments, or Salary of each such Officer or Person the Duty so charged in respect of his Profits and Gains.

VII. It shall be lawful for any Person assessed to the Duty Power for chargeable under Schedule (A.) of the said Act in respect of Persons assessed for Mines or Quarries against any such Assessment to the Commissioners for Special Purposes, instead of the Commissioners for General Purposes, if he shall think fit, and give due Notice of his Intention so to do, and thereupon such Appeal shall be heard and determined by Two or more of the Commissioners for Special Purposes in like Manner as any Appeal against an Assessment of the Duties contained in Schedule (D.) of the said Acts may lawfully be heard and determined by them; and all Powers and Authorities, Rules and Regulations, contained in the said Acts in relation to any such last-mentioned Assessment and Appeal, and to the carrying into execution and enforcing the Determination of the said Commissioners for Special Purposes thereon, shall be exercised and put in force in relation to any Appeal by this Act authorized to be made to the said last-mentioned Commissioners and their Determination thereon.

VIII. The several Collectors shall pay to the proper Duties to be collected and accounted for. Officer for Receipt or to his Deputy all the Monies of the said Duties collected and levied by such Collectors, on the respective Days to be appointed by such Officer for Receipt or his Deputy next after the Receipt of the said Duties by the said Collectors, and shall at the same Time account for the Duties given them in Charge respectively, and then payable by Law, in like Manner as they are now by Law required to account half yearly.

IX. Any Person assessed or charged to any of the Duties Exemption

where In- granted by this Act who shall prove that his aggregate  
come un- annual Income is less than One hundred Pounds shall be  
der L.100, exempt from the said Duties ; and any Person who shall be  
and Abate- assessed or charged to any of the said Duties, or shall have  
ment where less paid the same, either by Deduction or otherwise, and who  
than L.150. shall claim and prove that his total Income from every  
Source, although amounting to One hundred Pounds or  
upwards, is less than One hundred and fifty Pounds a Year,  
for the Year of the Assessment of his Profits or Gains, shall  
be entitled to be relieved from so much of the said Duties  
assessed upon or paid by him as shall exceed the Rate of  
Sevenpence for every Twenty Shillings of his Profits or  
Gains, and such Relief shall be given in the Manner pro-  
vided or directed in the like Cases by the said Act of the  
Sixteenth and Seventeenth Years of Her Majesty, and the  
Act of the Fifth and Sixth Years of Her Majesty, Chapter  
Thirty-five, therein mentioned.

X. No Claim for Repayment of Duty under this Act, or  
any former Act relating to the Income Tax, shall be allowed  
unless it shall be made within Three Years next after the End  
of the Year of Assessment to which the Claim shall relate.

XI. The Clauses and Provisions contained in the following  
Acts, that is to say, the Act of the Sixteenth and Seven-  
teenth Years of Her Majesty, Chapter Thirty-four, Section  
Fifty-four, another Act of the same Years, Chapter Ninety-  
one, an Act of the Eighteenth and Nineteenth Years of Her  
Majesty, Chapter Thirty-five, for granting Relief to Persons  
who have made such Insurances or contracted for such An-  
nuities as in the said Acts mentioned, shall be continued in  
force and be applied for the granting of the like Relief in  
regard to the Duties imposed by this Act.

Repay-  
ment not  
to be grant-  
ed unless  
claimed  
within  
Three  
Years.  
Relief in  
respect of  
Life Insu-  
rances, etc.  
continued.

#### CAP. XV.

*An Act for granting to Her Majesty certain Duties of  
Stamps.*—[3d April 1860.]

Most Gracious Sovereign,  
WE, Your Majesty's most dutiful and loyal Subjects, the  
Commons of the United Kingdom of *Great Britain* and  
*Ireland* in Parliament assembled, towards raising the neces-  
sary Supplies for defraying Your Majesty's Public Expenses,  
and making a permanent Addition to the Public Revenue,  
have freely and voluntarily resolved to grant unto Your  
Majesty the Duties herein-after mentioned ; and do humbly  
beseech Your Majesty that it may be enacted ; and be it

enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. The Stamp Duties now payable in the United Kingdom of *Great Britain* and *Ireland* for or in respect of the several Instruments, Matters, and Things mentioned or described in the Schedule to this Act annexed, whereon other Duties are by this Act granted, shall respectively cease and determine, and shall be and the same are hereby repealed; provided that the Stamp Duties now chargeable on any of the said Instruments, Matters, and Things shall be payable in respect of such of them as shall have been or shall be made, signed, or dated at any Time before the passing of this Act ; save and except that the Stamp Duties on Foreign Bills of Exchange by this Act granted shall be payable on all such Bills as shall, after the passing of this Act, be first negotiated, or, if not negotiated, paid in the United Kingdom.

Duties on Instruments described in Schedule repealed.

II. There shall be granted, raised, levied, and paid in and throughout the United Kingdom of *Great Britain* and *Ireland*, to and to the Use of Her Majesty, Her Heirs and Successors, for and in respect of the several Instruments, Matters, and Things described or mentioned in the said Schedule, or for or in respect of the Vellum, Parchment, or Paper upon which any of them respectively shall be written, the several Stamp Duties or Sums of Money set down in Figures against the same respectively, or otherwise specified and set forth in the said Schedule ; which said Schedule, and the several Provisions, Regulations, and Directions therein contained, with respect to the said Duties, and the Instruments, Matters, and Things charged therewith, shall be deemed and taken to be Part of this Act, and shall be applied and put in Execution accordingly.

New Duties as set forth in Schedule granted

III. All the Powers, Provisions, Clauses, Regulations, Directions, Allowances, and Exemptions, Fines, Forfeitures, Pains, and Penalties, contained in or imposed by any Act or Acts, or any Schedule thereto, relating to any Duties of the same Kind or Description, heretofore payable in the United Kingdom, and in force at the Time of the passing of this Act, shall respectively be of full Force and Effect with respect to the Duties by this Act granted, and to the Vellum, Parchment, Paper, Instruments, Matters, and Things charged and chargeable therewith, and to the Persons liable to the Payment of the said Duties, so far as the same are or shall be applicable, in all Cases not hereby expressly provided for, and shall be observed, applied, allowed, enforced, and put in Execution for and in the raising, levying, collecting, and

Provisions of former Acts to apply.



securing of the said Duties hereby granted, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express Provisions of this Act, as fully and effectually, to all Intents and Purposes, as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the Duties by this Act granted.

Personal  
Estate  
appointed  
by Will  
under  
general  
Powers  
to be  
chargeable  
with Pro-  
bate and  
Inventory  
Duties.

IV. The Stamp Duties payable by Law upon Probates of Wills and Letters of Administration, with a Will annexed, in *England* and *Ireland*, and upon Inventories in *Scotland*, shall be levied and paid in respect of all the Personal or Moveable Estate and Effects which any Person, hereafter dying, shall have disposed of, by Will, under any Authority enabling such Person to dispose of the same as he or she shall think fit; and for the Purpose of this Act such Personal or Moveable Estate and Effects shall be deemed to be the Personal or Moveable Estate and Effects of the Person so dying in respect of which the Probate of the Will or the Letters of Administration with the Will annexed of such Person are or is granted, or the Inventory is or is required to be exhibited and recorded, as the case may be; and such Estate and Effects, and the Value thereof, shall accordingly be included in the Affidavit required by Law to be made on applying for Probate or Letters of Administration, in order to the full and proper Stamp Duty being paid.

Probate  
and Inven-  
tory Duties  
in respect  
thereof to  
be a Charge  
on the Pro-  
perty.

V. The said last-mentioned Duties shall be a Charge or Burden upon the Property in respect of which the same are so payable, and shall be paid thereout by the Trustees or Owners thereof to the Person for the Time being lawfully having or taking the Burden of the Execution of the Will or Testamentary Instrument, or the Administration or Management of the Personal or Moveable Estate and Effects of the Deceased, for the Benefit of the Persons entitled to the Personal or Moveable Estate and Effects of the Deceased.

Money  
secured on  
Heritable  
Property  
and by  
Heritable  
Bonds in  
*Scotland*  
to be  
chargeable  
with Pro-  
bate and  
Inventory  
Duties.

VI. Money secured on Heritable Property in *Scotland*, and Money secured by *Scotch* Bonds in favour of Heirs and Assignees, excluding Executors, shall, for the Purposes of this Act, be held and interpreted to be Moveable Property, and shall be included in any Inventory to be exhibited and recorded in any Commissary Court in *Scotland* of the Estate and Effects of any Person deceased entitled thereto, and in *England* and *Ireland* respectively shall be deemed to be Estate and Effects for or in respect whereof any Probate of Will or Letters of Administration shall be granted; and every such Inventory, Probate, and Letters of Administration shall be chargeable with Stamp Duty in respect of such Moveable Property; and such Property, and the Value thereof, shall be included in any such Affidavit as aforesaid

made on applying for Probate or Letters of Administration in respect thereof in *England* or *Ireland*.

VII. Whereas it is considered that certain Testamentary Dispositions in *Scotland* are chargeable with Stamp Duty, and it is expedient that the same should be exempted : Be it enacted, That no Will, Testament, Testamentary Instrument, or Disposition *mortis causâ*, shall be chargeable with any Stamp Duty.

VIII. The Duties by this Act granted of One Penny and Threepence respectively specified in the said Schedule, and also of Sixpence, therein specified, under the Head of Cost Book Mines, may be denoted either by a Stamp impressed upon the Paper, or by an adhesive Stamp affixed thereto ; and the Commissioners of Inland Revenue shall provide Stamps of both Descriptions for the Purpose of denoting the said Duties ; and the Provisions and Regulations relating to adhesive Stamps contained in the next succeeding Section of this Act shall apply to all Cases where the Paper upon which the Instrument, Document, or Writing charged with the Duty shall not, at the Time of its being written, made, or signed, have thereon the proper impressed Stamp for denoting the said Duty.

IX. The Person who shall make, sign, or issue any Instrument, Document, or Writing in the Schedule to this Act mentioned, and chargeable with any of the Duties of One Penny and Threepence, shall, before he shall deliver the same out of his Hands, Custody, or Power, affix to it the proper adhesive Stamp denoting the Duty chargeable thereon or in respect of it, and shall effectually cancel and obliterate the Stamp, by writing upon it his Name, or the Name of his Firm or Principal, or the Initials thereof respectively, and the Date of the Day and Year on which he shall so write the same, and so and in such Manner as clearly and distinctly to indicate that the said Stamp has already been used, and so that it cannot, without Fraud, be again made use of ; and if any Person who ought so to affix any such Stamp, and to cancel and obliterate the same, shall refuse or neglect so to do, or if any Person shall receive or take by way of Security or Indemnity any of the said Instruments, Documents, or Writings, or shall deliver out or authorize the Delivery out of any Goods, Wares, or Merchandise to which the same relates, the said Instrument, Document, or Writing not having a proper adhesive Stamp affixed thereto, and cancelled and obliterated as hereby required, every such Person shall for every such Offence forfeit the Sum of Twenty Pounds ; and no Charge for Brokerage, Commission, Agency, or otherwise, made or to be made by any Broker, Agent, or other Person in or about the Sale or Purchase

Testamen-  
tary Dispo-  
sitions in  
Scotland  
not to be  
chargeable  
with  
Stamp  
Duty.

Certain  
Duties in  
the Sched-  
ule to be  
denoted  
either by  
impressed  
or adhesive  
Stamps.

The Per-  
sons mak-  
ing the In-  
struments  
to affix  
adhesive  
Stamps,  
and cancel  
same.

In default,  
Penalty  
L.20.

No Charge  
for Broker-  
age, etc. to  
be lawful

unless Instrument, etc. shall be duly stamped.

mentioned or referred to in any such Instrument, Document, or Writing made by him, shall be lawful, unless such Instrument, Document, or Writing shall be duly stamped as by this Act is required: Provided that no Person shall be subject or liable to the said Penalty for delivering any Goods, Wares, or Merchandise, under the Authority of any unstamped Order, in any Case where the Value of such Goods, Wares, and Merchandise shall therein be stated by the Person making, signing, or issuing the same to be under the Value of Forty Shillings.

Penalty for fraudulently stating Goods to be under the Value of 40s.

X. If any Person who shall make, sign, or issue any Order for, or any Writing or Document authorizing the Delivery of any Goods, Wares, or Merchandise by this Act charged with the Stamp Duty of One Penny, shall knowingly and wilfully state or permit to be stated therein that the said Goods, Wares, or Merchandise are or is under the Value of Forty Shillings, he shall, unless the said Order, Writing, or Document shall, at the Time of its being issued, be stamped to denote the said Duty, forfeit the Sum of Twenty Pounds.

The Person requesting the Entry of Transfer of any Share to affix and cancel an adhesive Stamp.

XI. The Person who shall write or sign any Note, Instrument, or Writing requesting or authorizing the Purser or other Officer of any Mining Company conducted on the Cost Book System to enter or register the Transfer of any Share or Shares or Part of any Share in any Mine, or shall give any Notice in Writing to such Purser or other Officer of any such Transfer, in whatever Form such Notice shall be, shall, in like Manner as herein-before provided, affix thereto the proper adhesive Stamp to denote the Duty by this Act charged thereon, and cancel and obliterate the same; and if he shall refuse or neglect so to do, or if the Purser or other Officer to whom such Request, Authority, or Notice shall be addressed, delivered, sent, or given, shall enter or register the Transfer of any Share mentioned or referred to in such Notice, or shall comply with or in any way give effect to such Notice, the same not being stamped as by this Act is required, every such Person so offending shall forfeit the Sum of Twenty Pounds.

In default, Penalty L.20.

The Payers of Foreign Bills to cancel Stamps.

XII. Whenever any Bill of Exchange, Draft, or Order having thereon an adhesive Stamp shall be presented for payment, the Person to whom the same shall be presented shall, upon paying the same, write or impress or cause to be written or impressed upon every Stamp affixed to the Bill the Word "paid," to the end that the Stamp may be more effectually cancelled, and made incapable of being used again; and in default of so doing he shall forfeit the Penalty of Twenty Pounds.

In default, Penalty L.20.

The Stamps on

XIII. The Duties by this Act granted upon or in respect of Bills of Exchange, Drafts, or Orders, drawn out of the

United Kingdom, shall be denoted by adhesive Stamps, in like Manner as the Duties now payable on Bills of Exchange drawn out of the United Kingdom; and all the Clauses, Provisions, Directions, Regulations, Penalties, and Forfeitures contained in the Act passed in the Seventeenth and Eighteenth Years of Her Majesty's Reign, Chapter Eighty-three, relating to adhesive Stamps on Bills of Exchange drawn out of the United Kingdom, as well as in this Act, so far as the same are applicable, shall be applied and put in force in respect of the Stamp Duties on Bills of Exchange by this Act granted, as fully and effectually as if the same were herein repeated and re-enacted.

XIV. If any Person shall fraudulently remove or cause to be removed, or assist in removing, from any Instrument, Document, or Writing of any kind, any adhesive Stamp, or shall affix any Stamp which shall have been so removed to any other Instrument, Document, or Writing chargeable with Stamp Duty, or to any Paper, with Intent that such Stamp might be used again; or if any Person shall sell, or offer for Sale, or utter any Stamp, or shall utter any Instrument, Document, or Writing with any Stamp thereon which shall have been so as aforesaid removed, knowing the same to have been removed, or shall practise or be concerned in any fraudulent Act, Contrivance, or Device not specially provided for, with Intent to defraud Her Majesty of the Duty, he shall forfeit, over and above any other Penalty to which he may be liable, the Sum of Fifty Pounds.

XV. Where an Instrument or Writing chargeable under this Act with the Duty of Sixpence, as an Agreement, shall be unstamped, and it shall appear thereby that the Matter thereof is under the Value of Twenty Pounds, the Penalty payable to Her Majesty, Her Heirs or Successors, on stamping the same, shall be Twenty Shillings, over and above the said Duty, in lieu of the Penalty now by Law payable on stamping an Agreement under Hand only.

Foreign Bills to be adhesive. The Provisions of 17 & 18 Vict., c. 88, to be applied.

Penalty on committing Frauds in relation to adhesive Stamps.

Penalty on stamping an Agreement under the Value of L.20 to be 20s. only.

**SCHEDULE** referred to,  
CONTAINING  
**THE DUTIES IMPOSED BY THIS ACT.**

SCHEDULE	Duty.
<p><b>AGREEMENT</b> for a Lease or Tack of any Lands, Tenements, Hereditaments, or Heritable Subjects for any Term not exceeding Seven Years; and Agreement, Minute, or Memorandum of Agreement, containing the Terms and Conditions on which any Lands, Tenements, Hereditaments, or Heritable Subjects are let, held, or occupied for any such Term as aforesaid.</p>	<p>The same Duty as on a Lease or Tack for the Term, Rent, Consideration, and Conditions mentioned in such Agreement, Minute, or Memorandum.</p>
<p>Provided that any Lease or Tack of the same Lands, Tenements, Hereditaments, or Heritable Subjects afterwards made, in pursuance of and conformably to any such Agreement, Minute, or Memorandum, which shall have actually paid the Duty payable on such Lease or Tack as aforesaid, shall not be chargeable with any higher Stamp Duty than Two Shillings and Sixpence, exclusive of progressive Duty, notwithstanding any Variation in the Terms or Conditions only, not affecting the Stamp Duty; and in any such Case the Lease or Tack shall, if required for the sake of Evidence, be stamped with a particular Stamp for denoting or testifying the Payment of the full and proper Stamp Duty on the Agreement, Minute, or Memorandum, on the same and the Agreement, Minute, or Memorandum being produced, and appearing to be executed or signed, and duly stamped in all other respects.</p>	
<p><b>AGREEMENT</b>, or any Minute or Memorandum of an Agreement, made in England or Ireland under Hand only, or made in Scotland without any Clause of Registration, and not otherwise charged nor expressly exempted from all Stamp Duty, where the Matter thereof shall be of the Value of Five Pounds or upwards, whether the same shall be only Evidence of a Contract, or obligatory upon the Parties from its being a written Instrument; together with every Schedule, Receipt, or other Matter put or indorsed thereon or annexed thereto, . . .</p>	<p>L. s. d. 0 0 6</p>
<p>And where the same shall contain 2160 Words or upwards, then for every entire Quantity of 1080 Words contained therein over and above the first 1080 Words a further progressive Duty of . . .</p> <p>Provided always, that where divers Letters shall be offered in Evidence to prove any Agreement between the Parties who shall have written such Letters, it shall be sufficient if any of such Letters shall be stamped with a Duty of One Shilling, although the same shall in the whole contain any Quantity of Words exceeding 2160.</p>	<p>0 0 6</p>
<p><b>BILL OF EXCHANGE</b>, Draft, or Order for the Payment of Money exceeding L.4000, now chargeable with the Stamp Duty of L.2. 5s.; For every L.1000 or Part of L.1000 of the Money thereby made payable, . . .</p>	<p>0 10 "</p>

SCHEDULE.	Duty.
<b>BILL OF EXCHANGE</b> (Foreign) drawn in a Set of Three or more for the Payment of Money exceeding L.4000, where every Bill of the Set is now chargeable with the Stamp Duty of Fifteen Shillings; Every Bill of the Set, for every L.1000, or Part of L.1000 of the Money thereby made payable, . . . . .	L. s. d.  0 3 4
<b>BILL OF EXCHANGE, DRAFT, or ORDER</b> (Foreign) drawn or endorsed out of the United Kingdom for the Payment of Money on Demand, . . . . .	The same Duty as on an Inland Bill of Exchange for the Payment of Money otherwise than on Demand, according to the Amount thereby made payable.
<p>All Bills, Drafts, or Orders for the Payment by any Banker or Person acting as a Banker of any Sum of Money, though not made payable to the Bearer or to Order, and whether delivered to the Payee or not; and all Writings or Documents entitling or intended to entitle any Person whatever to the Payment from or by any Banker or Person acting as a Banker of any Sum of Money, whether the Person to whom Payment is to be made shall be named or designated therein or not, or whether the same shall be delivered to him or not, shall respectively be deemed to be Bills, Drafts, or Orders for the Payment of Money chargeable with Stamp Duty, as if the same had been made payable to Bearer or to Order.</p> <p>Provided always, that any One Document or Writing, although directing the Payment of several Sums of Money to different Persons, shall be chargeable with Stamp Duty as One Order only.</p> <p style="text-align: center;"><i>Exemptions.</i></p> <p><i>Any Draft or Order drawn by any Banker upon any other Banker, not payable to Bearer or to Order, and used solely for the Purpose of settling or clearing any Account between such Bankers.</i></p> <p><i>Any Letter written by a Banker to any other Banker directing the Payment of any Sum of Money, the same not being payable to Bearer or to Order, and such Letter not being sent or delivered to the Person to whom Payment is to be made, or to any Person on his Behalf; and all Warrants or Orders for the Payment of any Annuity granted by the Commissioners for the Reduction of the National Debt, or for the Payment of any Dividend or Interest on any Share in the Government or Parliamentary Stocks or Funds, and all Drafts or Orders drawn by the Accountant-General of the Court of Chancery in England or Ireland, shall be exempt from all Stamp Duty.</i></p>	
<b>COPY.</b> —Certified Copy or Extract of or from any Register of Births, Baptisms, Marriages, Deaths, or Burials, . . . . . The said Duty to be paid by the Person requiring any such Copy or Extract.	0 0 1

SCHEDULE.	Duty.
<p><i>Exemptions.</i></p> <p><i>Copies of Entries of Baptisms, Marriages, and Burials transmitted to the Registrar of the Diocese, in pursuance of the 52 Geo. III., c. 146.</i></p> <p><i>Certified Copies of Registers sent by Superintending Registrars to the General Registrar, in pursuance of the 6 &amp; 7 W. IV., c. 86.</i></p> <p><i>And Copies or Extracts made or given under or in pursuance of the 7 Victoria, c. 15, to amend the Laws relating to Labour in Factories.</i></p>	L. s. d.
<p><b>COST BOOK MINES.</b>—Any Note, Instrument, or Writing requesting or authorizing the Purser or other Officer of any Mining Company conducted on the Cost Book System to enter or register any Transfer of any Share or Shares or Part of a Share in any Mine; or any Notice to such Purser or Officer of any such Transfer, . . . . .</p>	0 0 6
<p><b>DECLARATION</b> in lieu or in the Nature of an Affidavit, in any Case where, if the same were an Affidavit, it would be chargeable with any Stamp Duty, . . . . .</p>	<p>The same Duty as would be chargeable on such Affidavit</p>
<p><b>DELIVERY ORDER.</b>—Any Writing or Document commonly called a Delivery Order, or by whatever Name the same shall be designated, entitling or intended to entitle any Person therein named, or his Assigns, or the Holder thereof, to the Delivery of any Goods, Wares, or Merchandise of the Value of Forty Shillings or upwards, lying in any Dock or Port or in any Warehouse in which Goods are stored or deposited on Rent or Hire, or upon any Wharf, such Writing or Document being signed by or on behalf of the Owner of such Goods, Wares, or Merchandise, upon the Sale or Transfer of the Property therein, . . . . .</p>	0 0 1
<p><b>DOCK WARRANT.</b>—Any Warrant or Document commonly called a Dock Warrant, or any other Writing or Document, by whatever Name the same shall be designated, which shall evidence the Title of any Person therein named, or his Assigns, or the Holder thereof, to the Property in any Goods, Wares, or Merchandise lying in any Dock or Warehouse or upon any Wharf, such Writing or Document being signed or certified by or on behalf of the Company or Person in whose Custody such Goods, Wares, or Merchandise may be, . . . . .</p>	0 0 3
<p><i>Exemption.</i></p> <p><i>Any Writing or Document given by any Inland Carrier acknowledging the Receipt of Goods conveyed by such Carrier.</i></p>	
<p><b>LETTER or POWER of ATTORNEY</b> for the Sale, Transfer, or Acceptance of any of the Government or Parliamentary Stocks or Funds not exceeding in Value L.20; or for the Receipt of any Sum of Money, or any Cheque, Note, or Draft for any Sum of Money, not exceeding L.20; or Dividends or Interest of any such Stocks or Funds, or any other periodical Payments not exceeding the annual Sum of L.10, . . . . .</p>	0 5 0

ANNO VICESIMO TERTIO ET VICESIMO QUARTO

VICTORIÆ REGINÆ.

CAP. XXXIII.

*An Act to amend certain Provisions in the Bankrupt Law of Scotland.*—[3d July 1860.]

WHEREAS it is expedient that certain Provisions of "The 19 & 20 Bankruptcy (*Scotland*) Act, 1856," should be amended: Vict. c. 79.  
Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. This Act may be cited as "The Bankruptcy (*Scotland*) Short Title.  
Amendment Act, 1860."

II. If in any Case where Sequestration has been or shall Where it appears to be awarded in *Scotland* it shall appear to the Court of Ses- Court of sion or to the Lord Ordinary, upon a summary Petition by Session, the Accountant in Bankruptcy, or any Creditor or other &c. that the Estate Person having Interest, presented to either Division of the ought to be distributed in said Court or to the Lord Ordinary at any Time within be distributed in Three Months after the Date of the Sequestration, that a England or Ireland, Majority of the Creditors in Number and Value reside in Sequestration may be recalled. *England or Ireland*, and that from the Situation of the Pro- Sequestration may be recalled. perty of the Bankrupt or other Causes his Estate and Effects ought to be distributed among the Creditors under the Bankrupt or Insolvent Laws of *England* or *Ireland*, the said Court in either Division thereof or the Lord Ordinary, after such Inquiry as to them shall seem fit, may recall the Sequestration.

III. The said Court, in either Division thereof, or the Discharge of Bank- Lord Ordinary, or the Sheriff, may refuse the Application rupt may for the Discharge of any Bankrupt, although Two Years in certain have elapsed from the Date of the Sequestration, and al- Cases be though no Appearance or Opposition shall be made by or refused, on the Part of any of the Creditors, if it shall appear from although no Opposi- the Report of the Accountant in Bankruptcy or other suffi- tion be cient Evidence that the Bankrupt has fraudulently concealed made by Creditors. any Part of his Estate or Effects, or has wilfully failed to comply with any of the Provisions of "The Bankruptcy (*Scotland*) Act, 1856."

IV. All Interlocutors pronounced by the Lord Ordinary Interlocu-  
tors of  
Lord Or-  
dinary or  
Sheriff  
subject to  
Review.  
or the Sheriff under the Provisions of this Act shall be subject to the Review of the said Court of Session.



"Gazette"  
in said  
Act to  
mean  
Edinburgh  
Gazette.

V. To remove Doubts which have arisen, it is declared that the Word "Gazette" in the Sixty-seventh Section of the said Act shall be held to mean the "*Edinburgh Gazette*;" and the Provisions contained in the said Act relative to Deeds of Arrangement shall extend to and include Settlements or Arrangements by way of Composition.

Fee to  
Sheriff  
abolished.

VI. The Fee provided to be paid to the Sheriff under Schedule I. of the said Act is hereby abolished; but no Claim shall exist in respect of any such Fee which shall have been paid prior to the passing of this Act.

Fee pay-  
able to  
Sheriff for  
Attend-  
ances, &c.

VII. For attending any Meeting of Creditors or Examination a Fee of One Pound One Shilling shall be payable to the Sheriff for each such Meeting or Diet of Examination not being on the same Day.

Recited  
Act to re-  
main in  
Force.

VIII. "The Bankruptcy (*Scotland*) Act, 1856," except in so far as altered by this Act, shall be and remain in full Force and Effect, and shall be construed with this Act; and Words interpreted in the said Act shall when used in this Act have the same Meanings as are assigned to them respectively by the said Act.

#### CAP. XLV.

*An Act to extend the Act of the Eighth and Ninth Years of Victoria, Chapter Twenty-six, for preventing fishing for Trout or other Fresh-water Fish by Nets in the Rivers and Waters in Scotland.*—[23d July 1860.]

8 & 9 Vict.  
c. 26.

WHEREAS by the Act Eighth and Ninth Victoria, Chapter Twenty-six, intituled *An Act to prevent fishing for Trout or other Fresh-water Fish by Nets in the Rivers and Waters in Scotland*, Provision is made for preventing the Destruction of Trout and other Fresh-water Fish by Nets in the Rivers, Waters, and Lochs of *Scotland*: And whereas there are various other Ways by which Trout and other Fresh-water Fish may be destroyed which have not yet been declared illegal: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same:

Fishing  
for Trout,  
&c., by  
Means of  
Nets, &c.,  
in any  
Rivers, &c.,  
in Scotland  
prohibited.

I. That it shall not be lawful for any Person whatsoever (except as herein-after provided), at any Time after the passing of this Act, to fish for Trout or other Fresh-water Fish in any River, Water, or Loch in *Scotland*, with any Net of any Kind or Description, or by what is known as Double Rod Fishing, or Cross Line Fishing, or Set Lines or Otter Fishing, or Burning the Water, or by striking the Fish with any Instrument, or by Pointing, or to put into

the Water Lime or any other Substance destructive to Trout or other Fresh-water Fish with Intent to destroy the same; and if any Person shall wilfully take, fish for, or attempt to take, or aid and assist in taking or fishing for, or attempting to take or fish for, in or from any such River, Water, or Loch, any Trout or other Fresh-water Fish by or with any Net of any Kind or Description, or by Double Rod Fishing, or Cross Line Fishing, or by Set Lines, or Otter Fishing, or by Burning the Water, or striking the Fish with any Instrument, or by Pointing, or by putting into the Water Lime or any other Substance destructive to Trout or other Fresh-water Fish with Intent to destroy the same, such Person shall forfeit and pay any Sum not exceeding Five Pounds for every such Offence, besides forfeit- Penalty. ing the Trout or Fish taken, and also every Boat or Net, Tackle, Instrument, or other Article in or by which the same may have been taken or attempted to be taken, and shall also pay the full Expenses of the Conviction: Pro- Nothing to prevent Persons having Rights, &c., to fish. vided that nothing in this Act contained shall prevent any Person having the Right to fish in any River, Water, or Loch in *Scotland*, or any Person having Permission from such Person, from exercising the Right of fishing in such River, Water, or Loch in any Mode not prohibited by Law prior to the passing of this Act.

II. If any Person shall trespass upon any Ground, en- Penalty for trespassing on any Ground or River to fish with Net, &c. closed or unenclosed, or in or upon any River, Water, or Loch, with Intent to take any Trout or other Fresh-water Fish, with any Net, Double Rod, Cross Line, Set Line, or Otter, or by Burning the Water, or by striking the Fish with any Instrument, or by Pointing, or to destroy the Fish by putting Lime or other Substance destructive to Trout or other Fresh-water Fish into the Water, such Person shall forfeit and pay a Sum not exceeding Five Pounds for every such Offence.

III. It shall be lawful for any Person, having the Autho- Power to Persons having Authority to seize Boats, Nets, &c., used in Commission of Offences. rity of the Proprietor of Land through or past which the River or Water flows or upon which the Loch is wholly or partially situate, to seize and detain any Boat or Net of any Description, Double Rod, Cross Line, Set Line, or Otter, or Materials for Burning the Water, or Instruments for striking the Fish, or for Pointing, or Lime or other Substance destructive to Trout or other Fresh-water Fish, used or intended to be used in the Commission of any such Offence, and also any Fish taken by any such Offender, and to give Information thereof to the Sheriff or Justice of the Peace.

IV. All Justices of the Peace shall and may act in the Justices who are Proprietors not to Execution of this Act notwithstanding that such Justices shall be the Proprietors of Land through or past which any

be disqualified from acting.

River or Water may flow, or upon which any Loch may be wholly or partially situated, or shall otherwise have a Right of Trout or Fresh-water Fishing in any such River, Water, or Loch, except in Cases in which the Offence has been committed on the Property of such Justice, or in which such Justice is a Party to the Prosecution of the Case, or is directly interested in the Result thereof; and no such Proprietor or Party having Right as aforesaid shall be incompetent as a Witness to prove any Offence committed against this Act by reason of his being such Proprietor or having such Right.

For the Recovery of Penalties.

V. And for the Recovery of the Penalties and Forfeitures imposed by this Act, be it enacted, That any such Penalties or Forfeitures may be recovered by summary Proceeding upon Complaint in Writing made by the Procurator Fiscal or by any Party prosecuting for the same to the Sheriff or any Justice of the Peace for the County in which such Offence shall be committed, or to the Sheriff or any Justice of the Peace for any County in which the Offender may be found, and on such Complaint such Sheriff or Justice of the Peace shall issue a Warrant for bringing the Party complained against immediately before him, or shall issue an Order requiring such Party to appear at a Time and Place to be named in such Order; and every such Order shall be served on the Party complained against by any County Officer, either by delivering to such Party personally or by leaving with some Inmate at his usual Place of Abode a Copy of such Order, and of the Complaint whereon the same has proceeded; and either upon the Appearance or the Default to appear of the Party complained against, it shall be lawful for the Sheriff or Justice to proceed to the hearing of the Complaint; and upon Proof of the Offence, and without any written Pleadings or Record of Evidence, to convict the Offender, and upon such Conviction to decern, adjudge, and sentence him to pay the Penalty or Forfeiture incurred, and the Expenses attending the Conviction, and to grant Warrant for imprisoning him until such Penalty or Forfeiture and Expenses shall be paid: Provided always, that such Warrant shall specify the Amount of such Penalty or Forfeiture and Expenses, and shall also specify a Period at the Expiration of which the Party shall be discharged, notwithstanding such Penalty or Forfeiture and Expenses shall not have been paid, and which Period shall in no Case exceed Two Months; and it shall be lawful for the Sheriff or Justice to make such Orders concerning the immediate Disposal of any Boat, Net, Double Rod, Cross Line, Set Line, or Otter, or Materials for Burning the Water, or Instruments for

striking the Fish, or for Pointing, or Lime or other Substance destructive to Trout or other Fresh-water Fish, or Fish seized or forfeited under the Provisions of this Act, as may be necessary.

VI. It shall be lawful for any Person who shall think himself aggrieved by any Judgment of the Sheriff or Justice of Peace pronounced in any Case arising under this Act to appeal from the same to the next Circuit Court of Justiciary, or, where there are no Circuit Courts, to the High Court of Justiciary at *Edinburgh*, in the Manner and by and under the Rules, Limitations, Conditions, and Restrictions contained in an Act passed in the Twentieth Year of the Reign of his Majesty King *George* the Second, for taking away and abolishing Heritable Jurisdiction in *Scotland*, with this Variation, that such Person shall, in place of finding Caution in the Terms prescribed by the said Act, be bound to find Caution to pay the Penalty or Forfeiture and Expenses awarded against him by the Sentence appealed from in the Event of the Appeal being dismissed or not insisted in, together with any additional Expenses that may be awarded by the Court on deciding or dismissing the Appeal; and it shall not be competent to appeal from or bring the Judgment of any Sheriff or Justice of Peace acting in the Execution of this Act under Review, by Advocation or Suspension or by Reduction, or in any other Way than as herein provided.

Power to  
appeal in  
manner as  
in 20 G. 2,  
c. 48.

VII. All Penalties and Forfeitures imposed under the Authority of this Act shall, when levied, be paid, the one Half thereof to the Prosecutor, and the other Half to the Inspector of the Poor of the Parish within which the Offence shall have been committed, on behalf of such Poor.

Applica-  
tion of  
Penalties.

VIII. No Prosecution or other Proceeding whatever shall be brought or commenced against any Person for any Offence against this Act, unless the same shall be commenced within Three Months after such Offence shall have been committed.

Limitation  
of Actions.

IX. The Words "River," "Water," or "Loch" occurring in this Act shall mean and include any Stream, Burn, Mill-pool, Mill-lead, Mill-dam, Sluice, Pond, Cut, Canal, and Aqueduct, and every other Collection or Run of Water in which Trouts and other Fresh-water Fish breed, haunt, or are found or preserved; the Word "Sheriff" shall mean the Sheriff or Steward of the County in which the Offence happens or Case arises, and shall include the Sheriff-Substitutes of such Sheriffs; the Expression "Justice of the Peace" shall mean a Justice of the Peace of the County in which the Offence happens or Case arises; and the Expression "County Officer" shall mean and include Sheriff's

Interpreta-  
tion of  
Terms.

Officer, Constable, or any Officer of the County Police Force.

Saving the  
Laws re-  
garding  
the Sal-  
mon Fish-  
eries.

Saving the  
Laws re-  
garding  
fishing  
with  
Single  
Rod.

X. Nothing herein contained shall affect any Act of Parliament, General or Local, passed for the Preservation of the Salmon Fisheries in *Scotland*, or in relation to the fishing of Salmon or Fish of the Salmon Kind in *Scotland*.

XI. Nothing herein contained shall affect or apply to the killing of Trout or other Fresh-water Fish with Single Rod and Line which shall be regulated by the Laws in Existence prior to the passing of this Act.

#### CAP. XLVII.

*An Act to amend the Law relative to the Legal Qualifications of Councillors and the Admission of Burgesses in Royal Burghs in Scotland.*—[23d July 1860.]

3 & 4 W.  
4, c. 76.

9 & 10  
Vict. c. 17.

WHEREAS by the Fourteenth Section of an Act passed in the Third and Fourth Years of His late Majesty King William the Fourth, intituled *An Act to alter and amend the Laws for the Election of the Magistrates and Councils of the Royal Burghs in Scotland*, it was enacted, that no Person should be entitled to be received and inducted as Councillor who shall not previous to such Induction be entered a Burgess for the Burgh of which he is so elected, wherever there is any Body of Burgesses in any such Burgh, and that his Omission to produce Evidence of his being such Burgess when he declares his Acceptance of Office shall be held to vacate his Election, in the same Manner as if he had declined to accept: And whereas by an Act passed in the Ninth Year of Her present Majesty, intituled *An Act for the Abolition of the exclusive Privilege of Trading in Burghs in Scotland*, the exclusive Privileges and Rights possessed in certain Royal and other Burghs in Scotland, by the Members of certain Guilds, Crafts, or Incorporations, of carrying on or exercising certain Trades or Handicrafts within their respective Burghs, are abolished: And whereas it is expedient to repeal the said Clause of the first-recited Act, and to make Provision for the Admission of Persons to be Burgesses in manner and under the Conditions herein prescribed: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Sect. 14 of

I. That the said Fourteenth Section of the ~~first-recited~~

Act, in so far as inconsistent with this Act, shall be and the same is hereby repealed. 3 & 4 W.  
4, c. 76,  
repealed.

II. That it shall be lawful to the Magistrates and Council of any Royal Burgh, and they are hereby authorized and empowered, to admit any Person entitled to vote in the Election of any Member of Council for such Burgh to the Status of a Burgess thereof, and that by a Minute of the Council thereof, and on Payment of such Entry Money, not exceeding in any Case the Sum of One Pound, as the Council of the Burgh may from Time to Time fix, which Entry Money shall be accounted Part of the Common Good of the Burgh, and be applied accordingly; and every Person entitled to vote in the Election of any Member of Council shall, on being elected a Member of the Council of any Burgh, thereupon be eligible to be inducted, if before Induction he shall be admitted in Manner aforesaid to the Status of a Burgess of the Burgh, anything contained in the said Fourteenth Section of the first-recited Act notwithstanding: Provided always, that such Admission by Minute of Council shall not *per se* be held to give or imply any Right or Title to or Interest in the Properties, Funds, or Revenues of any of the Guilds, Crafts, or Incorporations of the Burgh, or any Mortifications or Benefactions for behoof of the Burgesses of such Guilds, Crafts, or Incorporations, or of their Families, or any Right of Management thereof, or any Membership in any of the said Guilds, Crafts, or Incorporations. Electors of  
Members of Council  
may be  
admitted  
as Bur-  
gesses on  
certain  
Condi-  
tions.

### CAP. LXXIX.

*An Act to provide additional Accommodation for the Sheriff Courts in Scotland.*—[6th August 1860.]

WHEREAS it is expedient that additional Accommodation should be provided for the Sheriff Courts in Scotland and the Offices connected therewith: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. This Act may be cited for all Purposes as "The Sheriff Court Houses Act, 1860." Short  
Title.

II. The following Words and Expressions in this Act shall have the Meanings hereby assigned to them, unless there be something in the Subject or Context repugnant to such Construction: Interpre-  
tation of  
Terms.

The Word "Sheriff" shall include Sheriffs Substitute:  
The Word "Magistrates" shall include Provost, Magistrates, and Council:

The Expression "Lands and Heritages," and the Expression "Valuation Rolls," shall have the same Meaning as is assigned to these Expressions in "The Valuation of Lands (*Scotland*) Acts," Seventeenth and Eighteenth *Victoria*, Chapter Ninety-one, and Twenty-first *Victoria*, Chapter Fifty-eight:

The Word "Court House" shall include Sheriff Clerk's Offices and Accommodation for the Procurator Fiscal, and for Procurators and Witnesses, and for the safe Custody of Documents: The Expression "Erection of a Court House" shall include the Addition to and the Alteration or rebuilding of any Court House already existing, and all necessary Works connected with such Erection, Addition, Alteration, or Rebuilding, and shall also include the Purchase of any existing Building for the Purpose of a Court House.

Represent-  
ation may  
be made to  
the Secre-  
tary of  
State of In-  
adequacy  
of existing  
Court  
Houses.

III. On a Representation in Writing being made to One of Her Majesty's Principal Secretaries of State, by any Three Commissioners of Supply of any County, or by Her Majesty's Lieutenant and the Sheriff Depute of any County in *Scotland*, setting forth that the Court House Accommodation in such County is inadequate, it shall be lawful for the Secretary of State to remit such Representation for Investigation, and report to such Persons as he may think fit, and to make such other Inquiry with respect thereto as he may think necessary.

Represent-  
ation, with  
Intimation  
of Opinion  
of Secre-  
tary of  
State, to  
be sent to  
the Clerk  
of Supply.

IV. If it shall appear to the Secretary of State, on Consideration of the Reports made to him, that a Court House or Additions to any existing Court House is or are required, he shall transmit such Representation to the Clerk of Supply of the County, with an Intimation of his Opinion thereon, for the Purpose of being laid before the Commissioners of Supply of the County.

Meeting of  
Commis-  
sioners of  
Supply to  
be called  
and held  
within One  
Month  
after the  
Receipt of  
Intima-  
tion, and  
Burghs  
may send  
Represent-  
atives.

V. Within Fourteen Days after the Receipt of such Intimation, a Special Meeting of the Commissioners of Supply of the County for the Purpose of considering the same, shall be called by Advertisement, stating the Purpose thereof, and signed by the Convener of the County, and inserted once in each of Two successive Weeks in at least One Newspaper published in the County, or if there be no Newspaper published therein, in at least One Newspaper published in an adjoining County, and such Meeting shall be held within One Month after the Receipt of such Intimation from the Secretary of State; and it shall be lawful for the Magistrates of every Royal and Parliamentary Burgh in the County the

Lands and Heritages situate in which Burgh are of not less yearly Value than Twenty Thousand Pounds, as appearing from the Valuation Rolls, if they see Cause, from Time to Time to elect such Number of Persons respectively as is set forth in the Schedule to this Act annexed to be present as their Representatives at the said Meeting, and at all subsequent Meetings of Commissioners of Supply for the Purposes of this Act, and such Persons shall be entitled to be present and to vote at such Meetings in like Manner with the Commissioners of Supply of the County.

VI. The Commissioners of Supply may at such Meeting resolve to proceed with the Erection of a Court House ; or, if it shall appear to them that additional Accommodation is not required at the Time, they may adopt a Resolution to that Effect.

Commissioners of Supply may adopt Resolution to proceed or otherwise.

VII. The Resolution of such Meeting shall, within Eight Days after the Date thereof, be transmitted by the Clerk of Supply to the Secretary of State ; and in the event of a Resolution being adopted that additional Accommodation is not required, the Clerk of Supply shall along with the same transmit any Statement of their Reasons for adopting such Resolution which the Commissioners of Supply or the said Representatives of Burghs may think fit to submit to the Secretary of State ; and on considering such Resolution and Statement (if any) it shall be lawful for the Secretary of State to dispose of the same, by deciding that additional Accommodation shall be provided, either by the Erection of a Court House or that additional Accommodation is not required at the Time, as he may think fit.

Secretary of State to dispose of Resolution.

VIII. The Decision of the Secretary of State shall be intimated to the Clerk of Supply, and in the event of such Decision being to the Effect that additional Accommodation shall be provided, it shall be lawful for the Commissioners of Supply, and they are hereby required, immediately after the Receipt of such Intimation, to proceed in Terms thereof to obtain Plans and Specifications of a Court House.

Decision of Secretary of State to be intimated to the Clerk of Supply.

IX. Such Plans and Specifications shall, after being approved of by the Commissioners of Supply, be deposited in the Sheriff Clerk's Office of the County, and shall there remain for Fourteen Days after the Insertion in a Newspaper published in such County, or if there be no Newspaper published therein, in a Newspaper published in an adjoining County, of a Notice intimating that such Plans and Specifications have been so deposited ; and during the said Period of Fourteen Days such Plans and Specifications shall be open to Public Inspection free of Charge.

Plans and Specifications to be deposited in Sheriff Clerk's Office for Public Inspection.

X. On the Expiration of the said Period of Fourteen



Specifica-  
tions to be  
approved  
by the  
Secretary  
of State.

Days, such Plans and Specifications shall be transmitted by the Clerk of Supply to the Secretary of State, who shall either approve of the same, or direct that any Alterations or Additions which he thinks necessary may be made thereon; and any Alterations or Additions directed by the Secretary of State shall be made by the Commissioners of Supply; and such Plans and Specifications shall thereafter be again transmitted by the Clerk of Supply to the Secretary of State, for his Approval.

On Plans  
and Speci-  
fications  
being ap-  
proved of,  
Buildings  
to be pro-  
ceeded  
with.

XI. On such Plans and Specifications being approved of by the Secretary of State, the same shall be returned to the Clerk of Supply; and the same, with an Estimate of the necessary Expense, having been submitted to and approved of by the Commissioners of Her Majesty's Treasury, it shall be lawful for the Commissioners of Supply, and they are hereby required, immediately after the Receipt of the Plans and Specifications so approved, to proceed to purchase and acquire the Lands required for the Court House, and enter into Contracts, and to do all other Things necessary for carrying into Effect the Purposes of this Act; and such Court House shall be erected and completed under the Superintendence of the Commissioners of Supply, or any Committee or Person appointed by them for that Purpose.

8 & 9 Vict.  
c. 18, incor-  
porated.

XII. For facilitating the Purchase of Lands for the Purposes of this Act, "The Lands Clauses Consolidation (*Scotland*) Act, 1845," is hereby incorporated with this Act; and the Expression, "the Promoters of the Undertaking," in the said Act shall, for the Purposes of this Act, mean the Commissioners of Supply of any County in *Scotland*: Provided that nothing in the said Act or in this Act contained shall authorize the Purchase of Lands otherwise than by Agreement.

Court  
Houses  
vested in  
Commis-  
sioners of  
Supply.

XIII. The Court Houses to be erected under the Provisions of this Act, and the Lands, Property, and Effects acquired for the Purposes thereof, shall vest in the Commissioners of Supply of the County in which such Court Houses are erected; and all Dispositions and Conveyances of Lands purchased and acquired under the Authority and for the Purposes of this Act shall be granted and taken to the Commissioners of Supply of such County by that Name, without further Description; and the Court Houses, Property, and Effects, which shall be so vested and acquired, shall be held by and for the Use of the Commissioners of Supply of such County for the Time being, without the Necessity of any continuing Title or Renewal of the Investiture, other than the said Dispositions and Conveyances and this Act; and such Court Houses shall be managed and kept in a proper State of Repair by the Commissioners of

Supply of such County, who shall have the Control and Superintendence thereof.

XIV. The Commissioners of Supply may make and enter into Agreements and Arrangements for and with respect to the Use of any Court Houses erected under the Provisions of this Act, or any Part thereof, with any Persons or Corporations desiring to use the same, on such Terms and Conditions as may be agreed upon, except on such Days as the said Court Houses are required for the Discharge of the ordinary Civil and Criminal Jurisdiction of the Sheriffs; and any Questions or Differences as to the Use or Disposal of any Court Houses erected or improved under the Provisions of this Act, or any Part thereof, which may arise between the Commissioners of Supply and such Persons or Corporations, or any other Person entitled or claiming to be entitled to the Use of such Court Houses, or any Part thereof, shall be referred to and decided by the Lord Advocate of *Scotland* for the Time being, whose Decision shall be final, and not subject to Review in any Court or by any Process whatsoever.

XV. On the Completion of any Court House which may be erected or improved under the Provisions of this Act, an Account of the total Expense thereof, including the Purchase of Lands and all incidental Expenses incurred in or with respect to the Erection or Improvement and fitting up and furnishing thereof, certified as correct under the Hands of the Convener and Two Commissioners of Supply of the County, shall be transmitted by the Clerk of Supply to the Commissioners of Her Majesty's Treasury; and it shall be lawful for the Commissioners of Her Majesty's Treasury, on the Receipt of such Account and Certificate, to pay One Half of such total Expense to such Commissioners of Supply, or their Treasurer, out of any Monies to be provided by Parliament from Time to Time for that Purpose; and the other Half of such total Expense shall be raised and defrayed by Assessment, as herein provided, on the Lands and Heritages in such County and the Burghs situate therein.

XVI. The Expense of maintaining, managing, and keeping in Repair, and of cleaning, lighting, and warming, the Court Houses to be erected or improved under the Provisions of this Act, including the Salaries or Wages of Porters, Hall Keepers, and other Persons employed therein, and other incidental annual Disbursements, shall be paid by the Commissioners of Her Majesty's Treasury out of any Monies to be from Time to Time provided by Parliament for that Purpose: Provided that the Accounts of all such Expenses shall be transmitted to and certified by the

Queen's and Lord Treasurer's Remembrancer, in such Manner as the Commissioners of Her Majesty's Treasury shall direct.

Additional  
Sum may  
be contri-  
buted in  
Circuit  
Towns.

XVII. In the Event of a Circuit Court of Justiciary being authorized to be held in any Burgh not being now a Circuit Town, it shall be lawful for the Commissioners of Her Majesty's Treasury, out of any Monies to be provided by Parliament from Time to Time for that Purpose, to contribute, towards the Erection of a Court House in such Burgh, over and above the Sums herein-before mentioned, the Amount which it shall appear to the said Commissioners corresponds to any Saving of Public Money thereby effected.

As to Dis-  
posal of  
Court  
Houses  
ceasing to  
be used.

XVIII. In case any Court House, or any Part thereof, not being the Property of private Parties or of the Magistrates and Council of the Burgh in which it is situate, shall cease to be used as such in consequence of other Accommodation having been provided under this Act, the Commissioners of Supply may sell the same for such Price as they may obtain therefor, and convey the same to the Purchaser: Provided always, that when the Building so discontinued forms Part of any Building used for other Purposes, the first Offer of the same shall be made to the Parties having Right to the other Parts of the Building, at such Price as may be agreed on, or, in Case of Disagreement, as may be fixed by Valuers appointed by the Sheriff of the County: Provided also, that the Price received shall be applied to the Purposes for which an Assessment is authorized by this Act, and in Diminution *pro tanto* of the Sum so to be levied.

Assess-  
ments to  
be imposed  
on Lands  
and Heri-  
tages.

XIX. The Assessments for the Purposes of this Act, to be called "The Court House Assessments," shall be imposed and levied for such Periods as may be necessary by the Commissioners of Supply of every County in which a Court House has been erected or improved under the Provisions of this Act, and the Magistrates of every Burgh situate therein, respectively on all Lands and Heritages situate within such County and Burghs, according to the yearly Rent or Value thereof as established by the Valuation Rolls, and such Commissioners of Supply and Magistrates respectively are hereby empowered and required to impose and levy such Assessments accordingly, and that at such Rate in every Year as such Commissioners of Supply shall deem necessary, in order to provide sufficient Funds for the Purposes of this Act, including such Sum as may be required to cover the Expenses of Assessment, Collection, and Management, and any Arrears of preceding Years, and the Assessment shall be payable as for the Period from

*Whitsunday* in the Year in which the same is imposed to *Whitsunday* in the Year immediately following, and may be levied either on the Proprietor or Tenant of such Lands and Heritages; but the Tenant, in the Event of his paying such Assessment, shall be entitled to deduct the Amount from the Rent payable by him: Provided that such Commissioners of Supply or Magistrates shall not levy any Assessment in respect of any Dwelling House, Shop, or other such Premises, or any Offices or Outhouses connected therewith, which shall be unoccupied and unfurnished during the whole Period to which such Assessment applies.

XX. In the Case of Lands and Heritages situated within any Burgh, let at a Rent under Four Pounds *per Annum*, or for a less Period than Half a Year, Deduction shall be allowed by the Magistrates of the Assessment for each entire Period of Six Months, from *Whitsunday* to *Martinmas* or from *Martinmas* to *Whitsunday*, during which any such Premises shall be unoccupied or not furnished. Regulations as to Payment of Small Assessments.

XXI. The Commissioners of Supply or the Magistrates, as the Case may be, may, on the Ground of the Poverty of any Person liable in Assessment under this Act in respect of any Lands and Heritages in Value not amounting to Four Pounds *per Annum*, remit, in whole or in part, Payment of the said Assessment by such Person, in such Manner as they shall in their Discretion think just and reasonable, but upon no other Account whatsoever. Commissioners of Supply may grant Relief from Assessment in Cases of Poverty.

XXII. The County of *Lanark* shall, for Purposes of Assessment under this Act, be divided into Four separate Districts, namely, the Upper Ward, the Lower Ward, the *Airdrie* District of the Middle Ward, as defined in "The *Airdrie* Rural District Police and *Airdrie* District Court Houses Act (1855)," and the *Hamilton* District, comprehending the Remainder of the Middle Ward; and the Court House Assessments under this Act, in respect of the Court Houses and Offices in each of the said Districts, shall be apportioned upon and levied from the landward Part and Burghs within such District only, and shall not affect the other Part of the said County. County of Lanark to be divided into Four Districts for Assessment under this Act.

XXIII. The whole Powers and Rights of issuing Summary Warrants for Recovery of the Land and Assessed Taxes shall be applicable to the Assessments by this Act authorized to be imposed and levied, and Sheriffs, Magistrates, Justices of the Peace, and other Judges shall grant Warrants for the Recovery of such Assessments in the like Form and under the like Penalties as is provided in regard to such Land and Assessed Taxes and other public Taxes; and all Assessments imposed in virtue of this Act shall, in the Case of Bankruptcy or Insolvency, be paid out of the Mode of recovering Assessments.

first Proceeds of the Estate, and shall be preferable to all other Debts of a private Nature due by the Parties assessed.

Disputes  
as to As-  
sessments  
to be sum-  
marily set-  
tled.

XXIV. Any Dispute which may arise between the Commissioners of Supply of any County, or the Magistrates of any Burgh, or any Person or Persons acting under them, respectively, on the one Part, and any Person holding himself aggrieved on the other, relating to any Assessment under this Act which it may not be competent or convenient to try and determine in the Sheriff Small Debt Court, shall be determined in a summary Manner by the Sheriff of the County in which such Dispute shall arise, or of the County in which the Court House is situate in respect of which such Assessment is leviable; and such Sheriff shall, on a written Petition being presented to him by any of the said Parties, appoint them to appear before him, and shall then investigate the Matter in dispute in such Way as he may think proper, and decide the same summarily; and such Decision shall be final, and shall not be subject to Appeal or Review in any Court or by any Process whatsoever.

Clauses of  
10 & 11  
Vict. c. 16,  
respecting  
Mortgages  
incor-  
porated.

XXV. The Clauses of "The Commissioners Clauses Act, 1847," with respect to the Mortgages to be executed by the Commissioners, are hereby incorporated with this Act; and the Word "Commissioners" in the said Clauses shall mean the Commissioners of Supply of any County in Scotland, and the Expression "the Special Act" in the said Clauses shall mean this Act.

Power to  
borrow on  
Mortgage.

XXVI. It shall be lawful for the Commissioners of Supply of any County to borrow on Bond or Mortgage, for the Purposes of this Act, any Sum not exceeding the Amount specified in the Account and Certificate hereinbefore mentioned as the total Expense incurred in the Erection or Improvement of any Court House or Offices, under the Provisions of this Act, and to make and grant Mortgages and Assignations of the Lands and Buildings vested in and acquired or to be acquired and erected by such Commissioners of Supply in virtue of this Act, and the Assessments to be levied under the Provisions thereof, in Security of the Payment of the Money so borrowed and Interest thereon; and if after having borrowed the said Sum or any Part thereof, such Commissioners of Supply shall pay off the same, otherwise than by means of the Monies received by them from the Commissioners of Her Majesty's Treasury, under the Provisions of this Act, or by means of the Sinking Fund provided for in the said Commissioners Clauses Act, it shall be lawful for them again to borrow the Amount so paid off, either by granting new

Mortgages and Assignations in Security therefor, or otherwise, and so from Time to Time as they shall think proper.

XXVII. It shall be lawful for such Commissioners of Supply, in the course of the Erection of any such Court House as aforesaid, to take from any Bank or Banking Company Credit on a Cash Account, to be opened and kept with such Bank or Banking Company in the Name of such Commissioners of Supply or their Clerk or Treasurer, according to the Usage of Bankers in *Scotland*, to the Extent of the estimated Expense of the Erection of such Court House, as approved by the Commissioners of Her Majesty's Treasury, or any Part thereof, and to make and grant Mortgages and Assignations of the Lands and Buildings vested in and acquired or to be acquired and erected by them in virtue of this Act, and the Assessments to be levied under the Provisions thereof, in Security of the Payment of the Amount of such Credit, or of the Sums advanced from Time to Time on such Cash Account, with the Interest thereon.

XXVIII. The whole Monies raised or borrowed under the Authority of this Act shall be applied to the Purposes herein specified, and to no other Purpose whatsoever; and separate and distinct Accounts of all Monies received and Payments made under the Authority of this Act shall be kept, made out, audited, and published in the Manner provided by the Police (*Scotland*) Act, Twentieth and Twenty-first *Victoria*, Chapter Seventy-two; and the Enactments and Provisions contained in Sections Forty to Forty-seven, both inclusive, of the said Act, with respect to the Appointment and Duties of a Collector of Assessments, and the keeping, making out, auditing, and publishing of Accounts, are hereby incorporated with this Act, and shall be applicable to the Assessments authorized to be levied and the Property to be acquired under the Authority of this Act, in the same Manner as if such Enactments and Provisions were herein repeated and re-enacted.

XXIX. In all Meetings and Proceedings under or with reference to this Act, any Five Commissioners of Supply of any County shall be deemed to be a Quorum, and shall be entitled to exercise all the Powers conferred by this Act; and every Question which may arise at any such Meeting shall be determined by the Votes of the Majority of Commissioners of Supply and Representatives of Burghs present at such Meeting; and where the Votes of those present shall be equal, the Preses of such Meeting shall have a Casting Vote, in addition to his deliberative Vote.

XXX. In all Meetings of Commissioners of Supply under or with reference to this Act, the Convener of the

Power to  
borrow on  
Cash  
Credit.

Monies  
raised, &c.,  
to be ap-  
plied to  
Purposes  
of this Act.

Quorum of  
Commis-  
sioners of  
Supply.

Preses of  
Meeting.

County, or, in the Absence of the Convener, the Person who may be elected by the Commissioners of Supply and Representatives of Burghs present at such Meeting to act as their Preses, shall be the Preses of such Meeting.

Authenti-  
cation of  
Documents  
relating to  
the Execu-  
tion of this  
Act.

XXXI. For the Purposes of this Act, the Signature of the Convener of the County, or of the Preses of any Meeting of Commissioners of Supply of any County, or of the Chairman of any Committee to be appointed for carrying into Effect the Purposes of this Act, adhibited to any Writing or Document, shall be equivalent to the Signatures of the whole Commissioners of Supply or of the whole Members of such Committee present at a Meeting thereof respectively; and the Addition to such Signature of the Word "Convener," "Chairman," or "Preses," shall be good *prima facie* Evidence that such Signature is the Signature of such Convener, Chairman, or Preses, as the Case may be, and that such Writing or Document is genuine and authentic.

Actions by  
or against  
Commis-  
sioners of  
Supply,  
how to be  
brought,  
and not to  
abate.

XXXII. All Actions, Suits, or Proceedings with respect to any Matter or Thing relating to the Execution of this Act, to be brought by or against the Commissioners of Supply of any County, shall be in the Name of the Clerk of Supply, or the Collector to be appointed under the Provisions of this Act, for the Time being, as the Party Pursuer or Defender representing such Commissioners of Supply; and no such Action, Suit, or Proceeding wherein such Commissioners of Supply shall be concerned as Pursuers or Defenders, in the Name of the Clerk of Supply or of such Collector, shall cease or abate by the Death, Resignation, or Removal of any such Clerk of Supply or Collector, or by any Change in such Commissioners of Supply, but the Clerk of Supply or Collector for the Time being shall be deemed to be the Pursuer or Defender, as the Case may be, in every such Action, Suit, or Proceeding.

#### SCHEDULE referred to in this Act.

Showing the Number of Members to be elected as Representatives of the several Royal and Parliamentary Burghs entitled to elect Representatives under this Act.

Annual Value of Lands and Heri- tages not less than			Number of Representatives		
£					
300,000	.	.	.	.	8
200,000	.	.	.	.	6
100,000	.	.	.	.	4
50,000	.	.	.	.	2
20,000	.	.	.	.	1

CAP. V.

*An Act to regulate Probate and Administration with respect to certain Indian Government Securities ; to repeal certain Stamp Duties ; and to extend the Operation of the Act of the Twenty-second and Twenty-third Years of Victoria, Chapter Thirty-nine, to Indian Bonds.*—[23d March 1860.]

WHEREAS at various Times the Executive Government of India has raised Moneys for the Public Service by the Issue of Government Promissory Notes and by Government Loans severally payable in India, and by various public Notifications of the said Government, or Regulations to be made by the Secretary of State in Council, the Owners of such Notes have been or may be allowed the Privilege of having the current Interest thereon made payable in London by Drafts payable in India, and the Holders or Owners of Shares or Portions of such Loans have been or may be allowed the Privilege of having the same registered and made transferable, and the Interest thereon made payable in London : And whereas upon the Death of the Holders of Notes as to which the said Privilege shall have been claimed Questions may arise as to the Place in which the same are properly to be deemed Assets of the deceased Owner, and it is for the Convenience and Advantage of the Estates of such Persons that the same should be deemed Assets in this Country and not in India : And whereas by an Act passed in the Session holden in the Fifth and Sixth Years of the Reign of His late Majesty King William the Fourth, Chapter Sixty-four, Section Five, the Transfer of any Part of the Territorial Debt of the East India Company in India in the Books of the said Company in England, whether upon a Sale thereof or otherwise, was made chargeable with a Stamp Duty of One Pound Ten Shillings, and it is expedient to repeal so much of the said Act as imposes the said Stamp Duty : And whereas under the Authority of various Acts of Parliament the East India Company were empowered to raise Money upon Bonds to be issued under their Common Seal, and the said Bonds formerly constituted the Bond Debt of the East India Company, and are commonly designated East India Bonds : And whereas by an Act passed in the Session holden in the Twenty-first and Twenty-second Years of the Reign of Her present Majesty, Chapter One hundred and six, Section Sixty-seven, all Liabilities of the East India Company were transferred to the Secretary of State in Council : And whereas by an Act passed in the last Session of Parliament, Chapter Thirty-nine, Power was given to the Secretary



of State in Council to raise Money by Bonds or Debentures or the Creation of a Capital Stock or Annuities upon or for the Repayment of any Principal Money secured under the Authority of the said Act or of either of the Acts therein recited: And whereas it is expedient to extend such Power of raising Money to the Repayment of any of the *East India* Bonds aforesaid: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows; (that is to say),

Indian Government Notes on which Interest is payable in London, and certain Indian Government Promissory Notes, to be deemed *Bona notabilia* in England.

I. All *Indian* Government Promissory Notes, and Certificates issued or Stock created in lieu thereof, being Assets of a deceased Person, the Interest whereon or in respect of which shall be payable in *London* by Drafts payable in *India*, and which at the Decease of the Owner thereof shall have been registered in the Books of the Secretary of State in Council in *London*, or in the Books of the Governor and Company of the Bank of *England*, or shall have been entered in *India* for the Purpose of being so registered before the Decease of the Owner thereof, and all *Indian* Government Promissory Notes issued with Coupons attached which, under such Regulations and Conditions as may be determined from Time to Time by the Secretary of State in Council, shall be so registered, and all Certificates issued or Stock created in lieu thereof, shall be deemed and taken to be Personal Estate and *Bona notabilia* of such deceased Person in *England*, and Probate or Letters of Administration in *England*, or Confirmation granted in *Scotland*, and sealed with the Seal of the Principal Court of Probate in *England*, in pursuance of the Provisions of the "Confirmation and Probate Act, 1858," shall be valid and sufficient to constitute the Persons therein named the legal Personal Representatives of the Deceased with respect to such Notes and Moneys as aforesaid.

Probate, &c., or Confirmation granted in Scotland valid, &c.

Transfers of Territorial Debt and of Indian Government Loans not chargeable with Stamp Duty.

II. So much of the Fifth Section of the said first-recited Act as enacts that every Transfer of any Part of the said Territorial Debt in the Books of the *East India* Company in *England*, whether upon a Sale thereof or otherwise, shall be chargeable with a Stamp Duty of One Pound Ten Shillings and no more, is hereby repealed; and no Transfer of any Part of the said Territorial Debt or of *Indian* Government Loans registered and transferable in the Books of the Secretary of State in Council in *London*, or in the Books of the Governor and Company of the Bank of *England*, shall be chargeable with any Stamp Duty.

Power to raise

III. Upon or for the Repayment of any Principal Money secured by the said Bonds, the Secretary of State in Council

may at any Time borrow or raise, by all or any of the Modes <sup>Money</sup> authorized by the said recited Act passed in the Session <sup>under Act 22 & 23</sup> holden in the Twenty-second and Twenty-third Years of <sup>Vict., c. 39,</sup> Her present Majesty, Chapter Thirty-nine, all or any Part <sup>extended to Repay-</sup> of the Principal Money so repaid or to be repaid, and so <sup>ment of</sup> from Time to Time as all or any Part of the Principal Money <sup>East India</sup> secured by the said Bonds may have been repaid or require <sup>Bonds.</sup> to be repaid, but the Amount to be charged upon the Revenues of *India* shall not in any Case exceed the Principal Money repaid or required to be repaid; and the Provisions of the said recited Act with reference to the Creation of the Capital Stock and Annuities created under the Authority of the said Act, and with reference to the Issue, Payment, and Transfer of the Capital Stock, Annuities, Bonds, and Debentures issued under the Authority of the said Act, shall be held to be in force and to apply to the Creation, Issue, Payment, and Transfer of the Capital Stock, Annuities, Bonds, and Debentures created and issued under the Authority of this Act.

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CAP. XXI.

*An Act to amend the Act for better regulating the Business of Pawnbrokers.*—[15th May 1860.]

WHEREAS by an Act of Parliament passed in the Thirty-ninth and Fortieth Years of the Reign of King *George* the Third, intituled *An Act for better regulating the Business of* <sup>39 & 40 G.</sup> *Pawnbrokers*, it is enacted, that every Pawnbroker shall, at <sup>8, c. 99.</sup> the Time of the taking of every Pawn, Pledge, or Exchange whatsoever, give to the Person or Persons so pawning, pledging, or exchanging the same a Note or Memorandum containing a Description thereof, with other Particulars, as in the Sixth Section of the said Act mentioned, and that every such Note, where the Sum lent shall be less than Five Shillings, shall be delivered gratis: And whereas it is expedient that Amendment should be made with respect to such Delivery: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows; that is to say,

I. Upon and from the Commencement of this Act it shall <sup>Pawn-</sup> be lawful for all Persons using and exercising the Trade or <sup>brokers</sup> Business of a Pawnbroker to take One Halfpenny for every <sup>may charge</sup> such Note or Memorandum as aforesaid where the Sum <sup>One Half-</sup> lent shall be less than Ten Shillings, anything in the said <sup>penny for</sup> Act contained to the contrary notwithstanding; and the <sup>Notes</sup> <sup>describing</sup> <sup>Things</sup>

pawned  
under 10s.

Payment  
for Pawns  
of 10s. or  
upwards to  
remain as  
stated in  
Sect. 6 of  
recited Act.

said Sixth Section of the said Act shall be read and construed as if it contained no Enactment for the Delivery of any Note or Memorandum gratis.

II. Provided always, that for every such Note or Memorandum where the sum lent shall be Ten Shillings or upwards, the respective Sum specified in such Behalf in the said Sixth Section shall and may be taken as heretofore.

### CAP. XXVIII.

*An Act to repeal the Act of the Seventh Year of King George the Second, Chapter Eight, commonly called "Sir John Barnard's Act," and the Act of the Tenth Year of King George the Second, Chapter Eight.*—[14th June 1860.]

7 G. 2, c. 8. WHEREAS an Act was passed in the Seventh Year of the Reign of King George the Second, Chapter Eight, to prevent the Practice of Stock-jobbing, and by another Act  
10 G. 2, c. 8. passed in the Tenth Year of the said King's Reign, Chapter Eight, the said first-mentioned Act was made perpetual: And whereas the said Acts impose unnecessary Restrictions on the making of Contracts for the Sale and Transfer of Public Stocks and Securities, and it is therefore expedient to repeal the same: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Recited  
Acts re-  
pealed.

I. From and after the passing of this Act the said Two several Acts before mentioned shall be and the same are hereby repealed.

### CAP. XLI.

*An Act to make perpetual an Act of the Twenty-first and Twenty-second Years of Her present Majesty, to amend the Law relating to Cheap Trains, and to restrain the Exercise of certain Powers by Canal Companies being also Railway Companies.*—[23d July 1860.]

21 & 22  
Vict., c. 75.

WHEREAS an Act was passed in the Session of Parliament held in the Twenty-first and Twenty-second Years of the Reign of Her present Majesty, intituled *An Act to amend the Law relating to Cheap Trains, and to restrain the Exercise of certain Powers by Canal Companies being also Railway Companies*: And whereas the said Act will expire at the End of the present Session of Parliament, and it is expedient to make the said Act perpetual: Be it therefore

enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows ; that is to say,

I. That the said recited Act shall be perpetual.

Recited  
Act made  
perpetual.

### CAP. LVIII.

*An Act to amend the Act of the Eighteenth and Nineteenth Years of Her Majesty relating to Friendly Societies.—*  
[6th August 1860.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. In case of the Dissolution of a Society, according to the Provisions of the Thirteenth Section of the Act passed in the Eighteenth and Nineteenth Years of Her Majesty, Chapter Sixty-three, it shall not be necessary to state in the Agreement the intended Appropriation or Division of the Funds or other Property, but it shall be lawful to the Members, if they shall think fit, to refer such Appropriation or Division to the Award of the Registrar ; and in case Application shall be made in Writing by the Members of a Society, not being less in Number than Five Eighths of the whole Body thereof, setting forth that the Funds of such Society are insufficient to meet the Claims thereon, with the Grounds upon which such Insufficiency can be proved, it shall be lawful for the Registrar to investigate the same, and if upon such Investigation he shall find that the said Society is in an insolvent Condition, and that it would conduce to the Interests of all Parties concerned, that the Affairs of the Society should be wound up and brought to a Termination, he shall make an Award to that Effect, and shall direct in what Manner the Funds and Property of the Society shall be divided or appropriated, and it shall not be necessary in such Case that the Provisions of the said Thirteenth Section be complied with ; provided that previous to such Investigation the Registrar shall give not less than Twenty-one Days Notice in Writing, to be sent by Post to the Trustees, Secretary, or other Officer of such Society, at the Place where such Society holds its Meetings.

In case of  
Dissolution  
of Society  
under Sect.  
13 of 18 &  
19 Vict., c.  
68, not ne-  
cessary to  
state in  
Agreement  
intended  
Division of  
Funds, but  
may refer  
the same to  
the Award  
of the Re-  
gistrar.

II. Every Award so made as aforesaid by the Registrar shall be final and conclusive on all Members and other Persons having any Claim on the Funds of the said Society, without Appeal, and shall be enforced in the same Manner as if it were a final and conclusive Award of the Registrar.

as by Section Forty-one of the said Act is provided for enforcing the Award of Arbitrators; and the Expenses of such Award, and of publishing the Notice of Dissolution in the Gazette, shall be paid out of the Funds of the Society before any Appropriation thereof shall be made.

Evidence  
of Dissolu-  
tion

III. When any Agreement for the Dissolution of a Society authorized by Section Thirteen of the said Act shall be transmitted to the Registrar; and when any Award authorized to be made by this Act shall be made by the Registrar, Notice thereof shall, within Twenty-one Days after the same shall have been so transmitted or made respectively, be advertised by the Registrar, as respects Societies in *England* in the *London Gazette*, as respects Societies in *Scotland* in the *Edinburgh Gazette*, and as respects Societies in *Ireland* in the *Dublin Gazette*; and unless within Three Calendar Months from the Date of the Gazette in which such Advertisement shall appear, a Member or other Person interested in or having any Claim on the Funds of the Society shall commence Proceedings to set aside the Dissolution of the Society consequent upon such Agreement or Award, the Society shall be considered for all Intents and Purposes, and in all Courts of Law and Equity, as legally dissolved, and the requisite Consents to such Agreement, or, as the Case may be, to the Application to the Registrar, to have been duly obtained, without Proof of the Signatures thereto.

Registrar's  
Annual  
Report to  
contain  
Particulars  
of Awards.

IV. The Registrar in his next Annual Report submitted to Parliament shall set forth the Particulars of every Award made under the Provisions of this Act which he may have made during the preceding Twelve Months.

Provisions  
as to So-  
cieties dis-  
solved be-  
fore pass-  
ing of this  
Act.

V. In regard to Societies which have been dissolved before the passing of this Act, if Notice of any Agreement for the Dissolution of such Society, already transmitted to the Registrar, or of any Award made under Section Thirteen of the said Act, shall within Three Months after the passing of this Act be advertised in such Gazette as aforesaid, the Provisions of Section Three of this Act shall apply in the same Way as if such Agreement and Award had been transmitted and made subsequent to the passing of this Act.

Sect. 8 of  
21 & 22  
Vict., c.;  
101, re-  
pealed.

VI. The Eighth Section of the Act passed in the Twenty-first and Twenty-second Years of Her Majesty, Chapter One hundred and one, is hereby repealed; but where, previously to the passing of this Act, any Application has been made to the Registrar respecting the Dissolution of a Society under the said Section, such Society shall be dissolved in the same Manner and with the same Incidents as if this Act were not passed, and for the Purposes of such Dissolution the said Section shall be deemed to remain in full Force.

VII. If Default shall be made in transmitting to the Registrar before the First Day of *June* in each Year the general Statement or Copy of the last Annual Report of any Society, in compliance with the Provisions of Section Forty-five of the Act of the Session of the Eighteenth and Nineteenth of *Victoria*, Chapter Sixty-three, the Officer making such Default shall be liable to a Penalty not exceeding Twenty Shillings, to be recovered, with Costs, at the Suit of the Registrar, before Two or more Justices, as to *England* in manner directed by an Act passed in the Session holden in the Eleventh and Twelfth Years of the Reign of Her Majesty Queen *Victoria*, Chapter Forty-three, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*, and as to *Scotland* before Two or more Justices or the Sheriff of the County, in manner directed by the Act passed in the Session of Parliament holden in the Seventeenth and Eighteenth Years of the Reign of Her Majesty Queen *Victoria*, Chapter One hundred and four, intituled *An Act to amend or consolidate the Acts relating to Merchant Shipping*, as regards Offences in *Scotland* against that Act, not being Offences by that Act described as Felonies or Misdemeanours, and as to *Ireland* in manner directed by the Act passed in the Session holden in the Fourteenth and Fifteenth Years of the Reign of Her Majesty Queen *Victoria*, Chapter Ninety-three, intituled *An Act to consolidate and amend the Acts regulating the Proceedings of Petty Sessions, and the Duties of Justices of the Peace out of Quarter Sessions, in Ireland*, or any Act passed for the Amendment of the above-mentioned Acts; and the Justices or Sheriff imposing any Penalty under this Act may direct the whole or any Part thereof to be applied in or towards Payment of the Costs of the Proceedings; and subject to such Direction all Penalties shall be paid into the Receipt of Her Majesty's Exchequer, in such Manner as the Treasury may direct, and shall be carried to and form Part of the Consolidated Fund of the United Kingdom of *Great Britain and Ireland*.

Penalty for not making Annual Return to Registrar in compliance with Sect. 6 of 9 & 10 Vict., c. 27.

VIII. If the Accounts and Returns required from certain Friendly Societies by the Commissioners for the Reduction of the National Debt, pursuant to Section Thirty-four of the said Act, be not made within Thirty Days after the same have been required, the Account of the said Society shall be closed by the said Commissioners, and thenceforth no Interest shall be credited to such Society thereon, until such Accounts and Returns shall be furnished to the said Commissioners, or the Money be withdrawn.

If Accounts not made to Commissioners, pursuant to Sect. 34 of 18 & 19 Vict., c. 63, Interest thereon to cease until Accounts made.

IX. Any Application authorized by Section Twenty-four Applica-

tion on behalf of Society may be made by Registrar. This and Friendly Societies Acts to be construed as One.

of the said recited Act to be made by any Person on behalf of a Society, may be made by the Registrar.

X. This Act and the Friendly Societies Acts, 1855 and 1858, shall be construed as One Act, and may be cited together for all Purposes as the Friendly Societies Acts.

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#### CAP. LXVII.

*An Act to continue an Act for authorizing the Application of Highway Rates to Turnpike Roads.*—[6th August 1860.]

4 & 5 Vict., c. 69. WHEREAS an Act was passed in the Fifth Year of the Reign of Her Majesty, intituled *An Act to authorize for One Year, and until the End of the then next Session of Parliament, an Application of a Portion of the Highway Rates to Turnpike Roads in certain Cases*, which Act has been continued by sundry Acts until the First Day of October in the Year One thousand eight hundred and sixty, and to the End of the then next Session of Parliament; and it is expedient that the same be further continued: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That the said Act shall be continued until the First Day of October One thousand eight hundred and sixty-five, and to the End of the then next Session of Parliament.

Recited Act further continued.

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#### CAP. LXXV.

*An Act to make better Provision for the Custody and Care of Criminal Lunatics.*—[6th August 1860.]

29 & 40 G. 3, c. 94. WHEREAS by the Act of the Session holden in the Thirtieth and Fortieth Years of King George the Third, Chapter Ninety-four, and the Act of the Session holden in the Third and Fourth Years of Her Majesty, Chapter Fifty-four, Her Majesty is empowered, where any Person is charged with any such Offence as therein mentioned, and acquitted on account of Insanity, and where any Person is indicted for any Offence and upon an Arraignment is found insane, to give Order for the safe Custody of such Person during Her Pleasure, in such Place and in such Manner as She may think fit; and by the said Act of the Third and Fourth Years of Her Majesty One of Her Majesty's Principal Secretaries of State is empowered, upon such Certificate as therein mentioned of the Insanity of any Person imprisoned as therein mentioned, to direct such Person to be

3 & 4 Vict., c. 64.

removed to such County Lunatic Asylum, or other proper Receptacle for Insane Persons, as the said Secretary of State may judge proper and appoint: And whereas by the Acts of the Session holden in the Fifth and Sixth Years of Her Majesty, Chapter Twenty-nine, and of the Session holden in the Sixth and Seventh Years of Her Majesty, Chapter Twenty-six, the said Secretary of State is empowered to order any Convict in *Pentonville* or *Millbank* Prison becoming or found insane during Confinement to be removed to such Lunatic Asylum as the said Secretary of State may think proper: And whereas it is expedient that Provision should be made for the Custody and Care of Criminal Lunatics in an Asylum or Asylums appropriated to that Purpose: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. It shall be lawful for Her Majesty from Time to Time, by Warrant under Her Royal Sign Manual, to appoint that any Asylum or Place in *England* which Her Majesty may have caused to be provided or appropriated, and may deem suitable for this Purpose, shall be an Asylum for Criminal Lunatics, and the Provisions of this Act shall be applicable to every such Asylum.

II. It shall be lawful for One of Her Majesty's Principal Secretaries of State, by Warrant under his Hand, to direct to be conveyed to and kept in any such Asylum any Person for whose safe Custody during Her Pleasure Her Majesty is authorized to give Order, or whom such Secretary of State might direct to be removed to a Lunatic Asylum under any of the Acts herein-before mentioned, or under any other Act of Parliament, or any Person sentenced or ordered to be kept in Penal Servitude, who may be shown to the Satisfaction of the Secretary of State to be insane, or to be unfit from Imbecility of Mind for Penal Discipline; and the Secretary of State may direct to be removed to and kept in such Asylum any such Persons as aforesaid, who, under any previous Order of Her Majesty or Warrant of the Secretary of State, may have been placed and remain in any County Lunatic Asylum, or other Place of Reception for Lunatics, and every Person directed by the Secretary of State to be conveyed or removed to and kept in an Asylum under this Act, shall be conveyed to such Asylum accordingly, and shall be kept therein until lawfully removed or discharged, and that with every Person so conveyed or removed there shall be transmitted a Certificate, as set forth in Schedule A. to this Act annexed, duly filled up and authenti-



cated, the Contents of which Certificate shall be transcribed into the General Register to be kept in every such Asylum.

Nothing to  
affect the  
Authority  
of the  
Crown to  
make other  
Provision  
for the Custody of a  
Criminal  
Lunatic.

III. Nothing in this Act shall restrain or affect the Authority of Her Majesty, where She may so think fit, to give such other Order for the safe Custody of any such Person as aforesaid as She might have given if this Act had not been passed, or restrain or affect the Authority of the Secretary of State to continue in or direct to be removed to any County Asylum or other Place for the Reception of Lunatics any of the Persons aforesaid whom he might have so continued or directed to be removed if this Act had not been passed.

Secretary  
of State to  
appoint  
Council of  
Super-  
vision and  
Officers for  
Asylums.

IV. It shall be lawful for the Secretary of State from Time to Time to appoint any such Persons as he may think fit, being not less than Three in Number, to be a Council of Supervision for any Asylum under this Act, and to remove all or any of the said Council, and upon the Removal, Death, or Resignation of any Member of the said Council, to appoint another in his Place; and also from Time to Time to appoint for the Asylum a resident Medical Superintendent, a Chaplain, and such other Officers, Assistants, and Servants as he may deem necessary, and at Pleasure to remove such Superintendent, Chaplain, Officers, Assistants, and Servants respectively; and the Secretary of State, with the Approval of the Commissioners of Her Majesty's Treasury, shall fix the Salaries to be paid to the Superintendent, Chaplain, Officers, Assistants, and Servants of such Asylum.

Secretary  
of State to  
make Rules  
for the Government  
of the  
Asylum.

V. It shall be lawful for the Secretary of State from Time to Time to make Rules for the Government and Management of the Asylum, and for the Duties and Conduct of the Officers thereof, and for the Care and Treatment of the Persons confined therein, and to subscribe a Certificate that they are fit to be enforced, and such Rules, when so certified, shall be binding on the Council, and all Officers, Assistants, and Servants of the Asylum, and all other Persons whomsoever, and all such Rules shall be laid before Parliament within Twenty-one Days after they shall be certified, or if Parliament be not sitting then within Twenty-one Days after the next Meeting of Parliament.

Subject to  
such Rules,  
Council to  
superin-  
tend Asy-  
lum.

VI. Subject to the Rules certified by the Secretary of State under this Act, the Council of Supervision shall superintend and direct the Management and Conduct of the Asylum, and the Care and Treatment of the Lunatics confined therein; and such Council or any Two of them shall from Time to Time, as by the Rules shall be provided, and at such other Times as they may think fit, report in Writing to the Secretary of State in relation to the Management and Conduct of the said Asylum and the Condition thereof, and to any Matters concerning the same; and if any Person de-

tained and confined as aforesaid shall be of a Religious Persuasion differing from that of the Established Church, a Minister of such Persuasion at the special Request of such Person or of his Friends or Relations shall be allowed to visit him at proper and reasonable Times by Application to the Medical Superintendent, and under such Rules as may be approved of by the Secretary of State, but no such Person shall be compelled to attend any of the Ordinances or Instructions of any Religious Persuasion other than his own.

VII. The Provisions of the Acts herein-before mentioned, or of any other Act for the Removal or Discharge of Lunatics whom the said Secretary of State is, under the herein-before mentioned Acts or any other Act now in force, authorized to direct to be removed to any Lunatic Asylum, shall extend and apply to any Lunatic whom the Secretary of State may direct to be conveyed to any Asylum for Criminal Lunatics appointed under this Act: Provided always, that any Order for Removal or Discharge which may now be made by the Secretary of State on the Certificate of Two Physicians or Surgeons may be made on the Certificate of the Resident Medical Superintendent of the Asylum and any Two of the Council of Supervision.

Provision as to Removal and Discharge of Lunatics.

VIII. Provided also, That where by reason of the Expiration of his Term of Imprisonment or Penal Servitude, or otherwise, a Person confined in the Asylum would be entitled to his Discharge if duly certified to have become of sound Mind, it shall be lawful for the Secretary of State by his Warrant to order the Discharge of such Person, although he may not have been certified as aforesaid, to the Intent that he may be placed in a County Lunatic Asylum, or otherwise subjected to the same Care and Treatment as Lunatics not being Criminals.

Provision for Discharge of Persons confined after their Term of Imprisonment has expired.

IX. Provided also, That it shall be lawful for the Secretary of State by his Warrant to permit any Person confined in the Asylum to be absent from such Asylum upon Trial for such Period as he may think fit, or to permit any such Person to be absent from such Asylum upon such Conditions in all respects as to the Secretary of State shall seem fit, and in case any Person so permitted to be absent upon Trial for any Period do not return at the Expiration of such Period, or in case any of the Conditions on which any Person is so permitted to be absent be broken, the Person not returning at such Expiration or absent after any such Condition has been broken, as the Case may be, may be retaken as herein provided in the Case of an Escape.

Secretary of State may permit any Lunatic to be absent from Asylum on Trial, &c.

X. All Provisions in the said Act of the Third and Fourth Years of Her Majesty for the Payment of the Conveyance of such insane Persons as therein mentioned to any

Provisions of 3 & 4 Vict., c. 54, as to Ex-

penses of  
Convey-  
ance and  
Mainte-  
nance to  
apply to  
this Act.

Asylum or other Receptacle, and of his Maintenance therein, shall extend and be applicable to the Conveyance of any such Person to any Asylum for Criminal Lunatics, and his Maintenance therein, and all Sums payable under any Order made under such Provisions shall be paid and applied towards defraying or reimbursing the Expenses in respect of which the same are paid, or other Expenses of the Asylum, as the Commissioners of Her Majesty's Treasury may direct.

Lunatics  
escaping  
may be re-  
taken by  
Superin-  
tendent,  
&c.

XI. In case of Escape of any Person confined in any Asylum for Criminal Lunatics, he may be retaken at any Time by the Superintendent of such Asylum, or any Officer or Servant belonging thereto, or any Person assisting such Superintendent, Officer, or Servant in this Behalf, or any other Person authorized in Writing in this behalf by the Secretary of State or such Superintendent, and conveyed to and received and detained in such Asylum.

Punish-  
ment of  
Persons for  
Rescue or  
permitting  
Escape.

XII. Any Person who rescues any Person ordered to be conveyed to any Asylum for Criminal Lunatics during the Time of his Conveyance thereto, or of his Confinement therein, and any Officer or Servant in any Asylum for Criminal Lunatics, who through wilful Neglect or Connivance permits any Person confined therein to escape therefrom, or secretes, or abets or connives at the Escape of any such Person, shall be guilty of Felony, and being convicted thereof shall be liable to be kept in Penal Servitude for any Term not exceeding Four Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, at the Discretion of the Court, and any such Officer or Servant who carelessly allows any such Person to escape as aforesaid, shall on summary Conviction before Two Justices of such Offence, forfeit any Sum not exceeding Twenty Pounds nor less than Two Pounds.

Penalty on  
Officers or  
Servants  
ill-treating  
Lunatics.

XIII. Any Superintendent, Officer, Nurse, Attendant, Servant, or other Person employed in any Asylum for Criminal Lunatics who strikes, wounds, ill-treats, or wilfully neglects any Person confined therein, shall be guilty of a Misdemeanour, and shall be subject to Indictment for every such Offence, and on Conviction under the Indictment to Fine or Imprisonment, with or without Hard Labour, or to both Fine and Imprisonment, at the Discretion of the Court, or to forfeit for every such Offence, on a Summary Conviction thereof before Two Justices, any Sum not exceeding Twenty Pounds nor less than Two Pounds.

Commis-  
sioners in  
Lunacy to  
visit Asy-  
lums;

XIV. Two or more of the Commissioners in Lunacy, One at least of whom shall be a Physician or Surgeon, and One at least a Barrister, shall, once or oftener in each Year, on such Day or Days and at such Hours of the Day and for such Length of Time as they think fit, and also at any Time

when directed by the Secretary of State, visit every Asylum for Criminal Lunatics, and shall inquire as to the Condition, as well mental as bodily, of the Persons confined therein, or any of them, and shall also make such other Inquiries as to such Asylum as to them may seem proper, or as such Secretary of State may direct.

XV. The Commissioners in Lunacy shall in the Month of *March* in every Year report to One of Her Majesty's Principal Secretaries of State the Visits made as aforesaid in the preceding Year, and all such Particulars in relation to every Asylum visited as aforesaid as they think deserving of Notice, and shall also report in like Manner in relation to any Visit made by the Direction of the Secretary of State, as soon as conveniently may be after such Visit, and a Copy of every such Report shall be laid before Parliament within Twenty-one Days after the Receipt thereof, or if Parliament be not sitting, then within Twenty-one Days after the next Meeting of Parliament.

#### SCHEDULE A.

STATEMENT respecting CRIMINAL LUNATICS to be filled up and transmitted to the MEDICAL SUPERINTENDENT with every CRIMINAL LUNATIC.

Name	.	.	.	.	.
Age	.	.	.	.	.
Date of Admission	.	.	.	.	.
Former Occupation	.	.	.	.	.
From whence brought	.	.	.	.	.
Married, single, or widowed	.	.	.	.	.
How many Children	.	.	.	.	.
Age of youngest	.	.	.	.	.
Whether First Attack	.	.	.	.	.
When previous Attacks occurred	.	.	.	.	.
Duration of existing Attack	.	.	.	.	.
State of bodily Health	.	.	.	.	.
Whether suicidal or dangerous to others	.	.	.	.	.
Supposed Cause	.	.	.	.	.
Chief Delusions or Indications of Insanity	.	.	.	.	.
Whether subject to Epilepsy	.	.	.	.	.
Whether of temperate Habits	.	.	.	.	.
Degree of Education	.	.	.	.	.
Religious Persuasion	.	.	.	.	.
Crime	.	.	.	.	.
When and where tried	.	.	.	.	.
Verdict of Jury	.	.	.	.	.
Sentence	.	.	.	.	.

## CAP. LXXVIII.

*An Act to place the Employment of Women, Young Persons, and Children in Bleaching Works and Dyeing Works under the Regulations of the Factories Acts.*—[6th August 1860.]

WHEREAS it is the Practice of some of the Occupiers of Bleaching Works and Dyeing Works to keep Females, Young Persons, and Children at Work during the Night, and an unreasonable Number of Hours during the Day: And whereas such Practices are not necessary to the successful carrying on of those Trades, but are very injurious to the Health and Morals of the Females, Young Persons, and Children employed therein, and it has become necessary to regulate the Employment of such People, and to provide for the Education of such Children: And whereas an Act was passed in the Fourth Year of the Reign of His late Majesty, intituled *An Act to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom*: And whereas an Act was passed in the Seventh Year of the Reign of Her present Majesty, intituled *An Act to amend the Laws relating to Labour in Factories*: And whereas an Act was passed in the Tenth Year of the Reign of Her present Majesty, intituled *An Act to limit the Hours of Labour of Young Persons and Females in Factories*: And whereas an Act was passed in the Fourteenth Year of the Reign of Her present Majesty, intituled *An Act to amend the Acts relating to Labour in Factories*: And whereas an Act was passed in the Seventeenth Year of the Reign of Her present Majesty, intituled *An Act further to regulate the Employment of Children in Factories*: And whereas an Act was passed in the Twentieth Year of the Reign of Her present Majesty, intituled *An Act for the further Amendment of the Laws relating to Labour in Factories*: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. That from and after the First Day of August One thousand eight hundred and sixty-one the Powers and Provisions of the herein-before recited Acts shall apply and be held to apply to Bleaching Works and Dyeing Works, except Works in which the Operation of Bleaching by the Open-air Process is the only Operation of Bleaching carried on, and to the Employment of Females, Young Persons, and Children in Bleaching Works and Dyeing Works, except

Recited  
Acts to  
apply to  
Bleaching  
and Dye-  
ing Works,  
and to the  
Employ-  
ment of  
Females,  
Young

as aforesaid, to all Intents and Purposes as completely and <sup>Persons,</sup> effectively as if such Bleaching Works and Dyeing Works <sup>and Chil-</sup> had been mentioned and included in the Provisions of the in-  
 herein-before recited Acts or any of them, except as is herein-  
 after provided: Provided nevertheless, that until the First  
 Day of *August* One thousand eight hundred and sixty-two  
 it shall be lawful to employ Females above the Age of  
 Eighteen Years and Young Persons in Bleaching Works  
 and Dyeing Works until Eight of the Clock at Night on  
 every working Day except *Saturdays*, and until Half past  
 Four of the Clock in the Afternoon on *Saturdays*.

II. Provided also, That after the said First Day of *August* <sup>Females</sup>  
 One thousand eight hundred and sixty-two it shall be lawful <sup>and Young</sup>  
 to employ Females above the Age of Eighteen Years and <sup>Persons</sup>  
 Young Persons in Bleaching Works and Dyeing Works, in <sup>may be</sup>  
 every Case where the Employment of such Females and <sup>employed</sup>  
 Young Persons, as regulated by the herein-before recited <sup>until Half</sup>  
 Acts, or any of them, or by this Act, shall have been sus- <sup>past Four</sup>  
 pended or Time shall have been lost in consequence of <sup>o'Clock on</sup>  
 Fluctuations in Trade, the Nature of the Process, or any <sup>Saturdays</sup>  
 other Cause, in recovering Time so lost, until Half past <sup>and until</sup>  
 Four of the Clock in the Afternoon on *Saturdays*, and until <sup>Eight</sup>  
 Eight of the Clock at Night on other Days: Provided that <sup>o'Clock on</sup>  
 by Means of such Employment the whole Time which such <sup>other Days,</sup>  
 Females and Young Persons, or any of them, shall have <sup>but not so</sup>  
 been employed during the then present Calendar Month <sup>as to ex-</sup>  
 and the then last past Six Calendar Months, do not exceed <sup>ceed in any</sup>  
 the total Number of Hours which such Females and Young <sup>Period of</sup>  
 Persons may lawfully be employed according to the Provi- <sup>Six Months</sup>  
 sions of the First Section of this Act and of the Provisions <sup>and Part of</sup>  
 of the recited Acts. <sup>Month the</sup>  
<sup>total Num-</sup>  
<sup>ber of</sup>  
<sup>Hours al-</sup>  
<sup>lowed by</sup>  
<sup>this Act, &c.</sup>

III. It shall not be lawful in any Case, after the said <sup>Restriction</sup>  
 First Day of *August* One thousand eight hundred and sixty- <sup>as to Time</sup>  
 one, to employ Females and Young Persons or any of them <sup>Females</sup>  
 in Bleaching Works or Dyeing Works, except such Works <sup>and Young</sup>  
 as before excepted, after Half past Four of the Clock in the <sup>Persons</sup>  
 Afternoon of any *Saturday*, or for more than Nine Hours on <sup>are to be</sup>  
 any *Saturday*, or for more than Twelve Hours on any other <sup>employed</sup>  
 Day. <sup>on Satur-</sup>  
<sup>days, and</sup>  
<sup>on other</sup>  
<sup>Days.</sup>

IV. In any Bleaching Works or Dyeing Works in which <sup>Females</sup>  
 the Employment of Females and Young Persons shall have <sup>and Young</sup>  
 been suspended during any Day or part of a Day, by reason <sup>Persons</sup>  
 of a Deficiency or Excess of Water in the Stream which, <sup>may be</sup>  
 by means of a Waterwheel, should drive the Machinery or <sup>employed</sup>  
 Part of the Machinery in such Works, but shall have failed <sup>during the</sup>  
 so to do, it shall be lawful to employ such Females and <sup>Night in</sup>  
 Young Persons in such Cases during the Day and the Night <sup>case of</sup>  
 following such Day (except such Day be *Saturday*, when <sup>Suspension</sup>  
<sup>of Employ-</sup>  
<sup>ment by</sup>  
<sup>Deficiency</sup>  
<sup>or Excess</sup>

of Water  
in the  
Stream,  
Saturday  
Night ex-  
cepted.

Occupiers  
who em-  
ploy Fe-  
males and  
Young  
Persons,  
according  
to the Pro-  
visions of  
this Act, to  
keep Regis-  
ters in the  
Form given  
in the  
Schedules  
annexed  
hereto.

As to Em-  
ployment  
of Females  
and Young  
Persons  
who have  
not been  
before em-  
ployed in  
Bleaching  
or Dyeing  
Works, &c.

Interpreta-  
tion of  
Terms.

they may work until Six of the Clock) for the same Number of Hours within the Twenty-four consecutive Hours of such Day and Night as such Females and Young Persons may then otherwise be lawfully employed according to the Provisions of the herein-before recited Acts or of this Act.

V. After the Month of *July* in the Year One thousand eight hundred and sixty-two the Occupier of every Bleaching Works or Dyeing Works, except such Works as before excepted, who shall employ Females and Young Persons, or any of them, after Half of an Hour after Two of the Clock in the Afternoon on any *Saturday*, or after Six of the Clock in the Evening on any other Day or Days, or during the Night, as herein-before provided, shall every Day, except *Sundays*, before Twelve of the Clock at Noon, register in a Book, first approved by an Inspector, in the Form given in Schedule (A.) to this Act annexed, in case such Females and Young Persons, or some of them, shall severally have been employed at or during a different Time or Times, the Time which each and every such Female and Young Person shall severally have been employed during the working Day last passed; and in case all such Females and Young Persons shall have been employed at one and as near as may be the same Time, then such Occupier shall every Day, except *Sundays*, before Twelve of the Clock at Noon register in a Book first approved by an Inspector, in the Form given in Schedule (B.) to this Act annexed, the longest Time which any such Females and Young Persons shall have been employed during the working Day last passed; and the Time so registered shall be held to be the Time which all such Females and Young Persons were so employed in such Works, unless it be proved otherwise to the Satisfaction of a Justice of the Peace.

VI. It shall be lawful to employ in Bleaching Works and Dyeing Works Females and Young Persons who shall not at any Time previous have been employed in any Bleaching Works or Dyeing Works, or who shall not have been employed at the same Works during the Calendar Month then last passed for the same Hours and at the same Time which it may then be lawful to employ Females and Young Persons who shall then be and have been employed at such Bleaching Works or Dyeing Works and none other during the Six Calendar Months last passed.

VII. In the Construction of this Act the words "Bleaching Works" and "Dyeing Works" shall be understood respectively to mean any Building, Buildings, or Premises in which Females, Young Persons, and Children, or any of them, are employed, and in One or more of which Buildings or Premises any Process previous to packing is carried on

in the Occupation of Bleaching, Dyeing, or Finishing of any Yarn or Cloth of Cotton, Silk, Wool, or Flax, or any of them, or any Mixture of them, or any Yarn or Cloth of any other Material or Materials, and in One or more of which Processes Steam, Water, or other mechanical Power is used or employed; and the Words "the Operation of Bleaching by the Open-air Process" shall include every Process, whether of preparing, beetling, dyeing, finishing, or otherwise, to which Yarn or Cloth *bonâ fide* bleached in the open Air in Fields or Greens is usually and properly subjected.

VIII. That so much of Section Twenty-eight of the here-  
in-before secondly recited Act as provides that Notices of all  
Time lost which is intended to be recovered, and of all Time  
which shall be recovered, shall be hung up in the Entrance  
of the Factory, and the whole of Section Thirty-three of  
the said Act, shall not apply to the Employment of Females  
or Young Persons under the Provisions of this Act; and  
that so much of Section Twenty-eight of the said Act as  
provides that Notices of the Times of the Day and Amount  
of Time allowed for their several Meals, of all Time lost  
which is intended to be recovered, and of all Time which  
shall be recovered, shall be hung up in the Entrance of the  
Factory, and so much of Section Thirty-six of the said Act  
as provides that during any Meal Time which shall form  
any Part of the Hour and a Half allowed for Meals no  
Child or Young Person shall be employed, or allowed to  
remain in any Room in which any manufacturing Process  
is then carried on, and all the Young Persons employed in  
a Factory shall have the Time for Meals at the same Period  
of the Day, shall not apply to the Employment of Male  
Persons above Thirteen Years of Age in any Dyeing Works,  
or to the Employment of Children or Young Persons during  
the Meal Time of such Male Persons.

IX. Nothing in this Act contained shall extend or apply  
to any Person in so far as they are employed in the open  
Air, or to any Building, Buildings, or Premises used  
solely for the Purposes declared in the Act of the Ninth  
Year of Victoria, intituled *An Act to regulate the Labour of*  
*Children, Young Persons, and Females in Print Works*, or  
to the Occupier of such Building, Buildings, or Premises  
in respect thereof, or to any Person or Persons employed  
solely in the Manner declared and regulated by the said  
Act, or to any Premises, either open, inclosed, or covered,  
used or to be used *bonâ fide* exclusively for the Purposes of  
carrying on the Process, Occupation, Trade, or Business  
of Turkey Red Dyeing, or to any Employment necessary

Amend-  
ment of  
Sect. 28 of  
7 & 8 Vict.  
c. 15, as to  
Notice of  
Time lost  
intended  
to be re-  
covered.

Act not to  
apply to  
Premises  
used solely  
for Pur-  
poses de-  
clared in  
8 & 9 Vict.  
c. 29, regu-  
lating La-  
bour of  
Children in  
Print  
Works.





## SCHEDULE (B.)

Register of the longest Time which any Female or Young Person has been employed on each Day of the Month ending [February 18th 1860], by [John Armstrong and Company] at the [Fir Trees] Bleaching Works or Dyeing Works, situate in the Township of [Hopetoun] in the County of [Lancaster].

	Monday.		Tuesday.		Wednesday.		Thursday.		Friday.		Saturday.	
	Hrs.	Min.	Hrs.	Min.	Hrs.	Min.	Hrs.	Min.	Hrs.	Min.	Hrs.	Min.
(1860.)												
Week ending (January 28)												
Week ending (February 4)												
Week ending (February 11)												
Week ending (February 18)												

## CAP. LXXX.

*An Act to regulate the Levying and Collection of the Inventory Duty payable upon Heritable Securities and other Property in Scotland.*—[6th August 1860.]

WHEREAS by an Act passed in the present Session of Parliament, Chapter Fifteen, it was enacted, that Money secured on Heritable Property in *Scotland*, and Money secured by *Scotch* Bonds in favour of Heirs and Assignees, excluding Executors, should for the Purposes of the Act be held and interpreted to be Moveable Property, and should be included in any Inventory to be exhibited and recorded in any Commissary Court in *Scotland* of the Estate and Effects of any Person deceased entitled thereto, and in *England* and *Ireland* respectively should be deemed to be Estate and Effects for or in respect whereof any Probate of Will or Letters of Administration should be granted; and that every such Inventory, Probate, and Letters of Administration should be chargeable with Stamp Duty in respect of such Moveable Property; and that such Property and the Value thereof should be included in any Affidavit as therein mentioned, made on applying for Probate or Letters of

23 & 24  
Vict., c. 15.

Administration in respect thereof, in *England* or *Ireland*; and it is expedient that the levying and collecting of the said Duty should be regulated as herein-after mentioned: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Money secured on Heritable Property in Scotland and Scottish Bonds, excluding Executors, to be liable to Inventory Duty.

I. All Money secured on Heritable Property in *Scotland*, and all Money secured by *Scottish* Bonds and other Instruments, excluding Executors, and all Money secured by *Scottish* Bonds and other Instruments the Rights to which shall be taken excluding Executors, constituting the Succession or Part of the Succession of any Person who shall have died on or after the Third Day of *April* in the Year One thousand eight hundred and sixty, shall be liable to Inventory Duty under the said recited Act.

Duty, and Interest thereon, shall be a Debt to Her Majesty, to be payable by Person who shall take Money secured.

II. The said Duty, with Interest thereon at the Rate of *Five per Centum per Annum* from the Expiry of the Period of Six Months after the Death of such deceased Person, shall be a Debt to Her Majesty, and shall be payable by any and every Person who shall take any Money secured as aforesaid, constituting the Succession or Part of the Succession of any Person deceased, and that whether he shall take the same as having a beneficial Interest therein, or as Trustee, or in any other Capacity, and whether he shall have an absolute Right, or only a *Liferent* or Life Interest, or other limited Right or Interest therein, and whether he shall take the same by *Mortis causâ* Conveyance, or by special Destination, or by Inheritance.

Stamped special Inventory to be lodged on Oath with the Solicitor of Inland Revenue at *Edinburgh*.

III. The Person or Persons so taking such Money as aforesaid shall, within Six Months next after taking the same or any Part thereof or any Interest due thereon, lodge with the Solicitor of Inland Revenue at *Edinburgh* a full and true Inventory upon Oath or solemn Affirmation, to be called a "Special Inventory," in the Form of the Schedule annexed hereto, of all Money secured as aforesaid, constituting the Succession or Part of the Succession of such deceased Person, such Special Inventory having thereon a Stamp denoting the Duty payable on the Value of such Money secured as aforesaid contained in such Inventory, being the same Rate and Amount of Duty, whether testate or intestate, as the Case may be, which would have been payable as Inventory Duty on Moveable or Personal Estate of the same Value; and the Oath or Affirmation to the said Special Inventory may be taken before any Magistrate or Justice of the Peace within the United Kingdom or the Colonies, or any *British* Consul; provided that in all Cases

the Duty, together with the Interest and necessary Expenses, upon any Money contained in such Inventory, by whomsoever the same may have been originally paid, shall, in the Absence of any special Agreement or Provision or valid Testamentary Direction to the contrary, be ultimately borne by the Person or Persons beneficially interested in such Money, and if there shall be more than one Person so interested the Duty shall be borne by them proportionally according to their several and beneficial Interests in the Money on which the Duty has been so paid.

IV. It shall be lawful for the Executor or Executors of Money so the Deceased to add the Amount of Money so secured, and the Value thereof, including the Proceeds accrued thereon, <sup>secured may be added to</sup> as herein-after mentioned, to the Inventory in Scotland of <sup>Inventory of Personal or Moveable Estate.</sup> the Deceased's Moveable or Personal Estate, and to pay the Stamp Duty on the aggregate Amount, in which case no Special Inventory or separate Stamp Duty shall be required from the Person or Persons beneficially entitled to the Money so secured; provided that in this Case the Executor or Executors of the Deceased shall make Oath (or, if so privileged, solemn Affirmation) of the true Amount and Value <sup>As to Return of Duty on the Ground of Debts.</sup> of the said Money and Proceeds; and the contingent Provision for Return of Duty, herein-after provided for, in regard to the Debts of the Deceased, shall in such Case be applicable *mutatis mutandis*; and farther, in this Case, the Inventory Duty so paid on the aggregate Amount of the <sup>Duty paid on the aggregate Amount to be ultimately borne by the Parties according to their beneficial Interest.</sup> Deceased's Moveable or Personal Estate, and of the said Money and Proceeds, shall, in the Absence of any special Agreement or Provision or valid Testamentary Direction to the contrary, be ultimately borne by the Persons beneficially interested proportionally according to their several and beneficial Interests in the aggregate Amount on which the Stamp Duty shall have been so paid, and with Right of Relief accordingly.

V. The Special Inventory provided by this Act, and the Inventory of the Personal Estate of a Deceased, containing also the Property on which Duty is imposed by the recited Act and this Act, shall be stamped with Duty according to the Value of the Property contained therein at the Time they shall be respectively sworn to, including the Proceeds accrued thereon down to that Time, and the Duty or deficient Duty according to such Value and Proceeds and Interest thereon, at the Rate of Five *per Centum per Annum*, shall be a Debt due to Her Majesty by the Person making Oath to said Inventories; and it is hereby provided, that the Inventory and additional Inventory of any Person deceased required to be exhibited and recorded in the proper Commissary Court in Scotland shall be stamped with Duty ac-

according to the Value of the Property contained therein at the Time they shall be respectively sworn to, including the Proceeds accrued thereon down to that Time; and the Duty or deficient Duty according to such Value and Proceeds, and Interest thereon at the Rate of Five *per Centum per Annum*, shall be a Debt to Her Majesty by the Person making Oath to said Inventory and additional Inventory, and his Heirs and Successors; and if such Inventory and additional Inventory shall not be exhibited and recorded, the Inventory Duty on all the Personal or Moveable Estate and Effects of the Deceased, and Interest thereon at the Rate of Five *per Centum per Annum* from the Expiry of the Period of Six Months after the Death of such deceased Person, shall be payable and shall be a Debt to Her Majesty by the Person who shall intromit with or enter upon the Possession and Management of such Personal or Moveable Estate and Effects, or any Part thereof, and his Heirs and Successors.

Power to grant a Return of Duty under Circumstances herein stated.

VI. The Commissioners of Inland Revenue shall grant a Return of the said Duty, corresponding to a rateable Apportionment of the Amount by which the Debts (in respect of which a Claim for Return of Inventory Duty may be competent) shall be proved to the Satisfaction of the said Commissioners to exceed the Personal Estate of the Deceased, between the Amount of the Money contained in the said Special Inventory and all the other Heritable Property of the Deceased; provided such Return shall be claimed within Three Years from the Date of lodging the Special Inventory.

Intromitters, &c., to be held to have taken Money so secured.

VII. Every Person shall for the Purposes of this Act be held to have taken Money secured as aforesaid who shall have received or intromitted with such Money or any Part thereof, or any Interest due thereon; or who shall have made up a Title thereto.

Money secured on Land by absolute Conveyance, and Adjudication, and otherwise, to fall under the Provisions of the Act.

VIII. Money secured upon Heritable Property by Conveyance *ex facie* absolute, and Money secured by Adjudication when the Right of Reversion has not expired, and all Money secured in any other Way upon Heritable Property, shall be subject to the Provisions of the recited Act and this Act: Provided always, that nothing therein and herein contained shall be held to apply to Feu Duties or to other permanent periodical Payments which are made a Real Burden upon Land, where Payment of a Capital Sum of Money is not thereby secured.

Recited Act repealed to a certain Extent.

IX. The said recited Act is hereby repealed, in so far as it provides that in *England* and *Ireland* the said Money shall be deemed Estate and Effects for and in respect of which Probate and Letters of Administration shall be granted.

and shall be included in the Affidavit made on applying for Probate or Letters of Administration in *England* and *Ireland*.

### SCHEDULE.

SPECIAL Inventory of the Money secured on Heritable Property in Scotland, and Money secured by Scotch Bonds, &c., excluding Executors, belonging to [Name and Description of Deceased], who died at \_\_\_\_\_ on the \_\_\_\_\_ Day of \_\_\_\_\_ 18\_\_\_\_ for Payment of the Duty imposed by the Act 23 & 24 Victoria, Cap. 80.

£   s.   d.

- I. Bond and Disposition in Security dated \_\_\_\_\_ granted by \_\_\_\_\_ in favour of the Deceased, over Lands in the County of [*Fife*] [*or Houses in the City of (Edinburgh), &c. If Deceased acquired Right by Assignment, &c., describe Title.*]
- II. Interest thereof from the \_\_\_\_\_ Day of \_\_\_\_\_ to the \_\_\_\_\_ Day of \_\_\_\_\_
- III. Bond dated \_\_\_\_\_, granted by \_\_\_\_\_ in favour of the Deceased, excluding Executors. [*If the Deceased's Right is by Assignment, &c., describe Right.*]
- IV. Interest thereon as above . . . . .

AT \_\_\_\_\_ the \_\_\_\_\_ Day of \_\_\_\_\_ One thousand eight hundred and \_\_\_\_\_, in Presence of \_\_\_\_\_ Esquire, One of the Magistrates for the City of [*Edinburgh*] [*or Justice of the Peace, or British Consul*],

Appeared \_\_\_\_\_, who, being solemnly sworn and examined, depones, that [Name and Description of Deceased] died at \_\_\_\_\_ on the \_\_\_\_\_ Day of \_\_\_\_\_; that the Deponent has Right to the above Subjects [*or Part of the above Subjects, or to the Liferent of the above Subjects, &c.*] as heir of the Deceased [*or as Legatee, or as One of the Trustees of the Deceased, &c.*]; that the Deponent knows of no Settlement or other Writing

left by the Deceased relative to the Disposal of his Personal Estate or Effects or any Part thereof [*or that the Deponent does not know of any Settlement or Writing relative to the Disposal of the Deceased's Personal Estate or Effects, or any Part thereof, other than a general Disposition and Deed of Settlement dated the* Day of registered in the Books of Council and Session on the Day of ]; that the foregoing Inventory, each Page of which is signed by the Deponent as relative hereto, is a full and complete special Inventory of all the Money or Property belonging to the Deceased, and Proceeds thereof, liable to the Duty imposed by the Acts 23 Vict. Cap. 15. and 23 & 24 Vict. Cap. 80. [*this Act*], in so far as the same has come to the Deponent's Knowledge; and that the said Property is of the Value of Pounds, and under the Value of Pounds. All which is Truth, as the Deponent shall answer to God.

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CAP. LXXXIV.

*An Act for preventing the Adulteration of Articles of Food or Drink.*—[6th August 1860.]

WHEREAS the Practice of adulterating Articles of Food and Drink for Sale, in fraud of Her Majesty's Subjects and to the great Hurt of their Health, requires to be repressed by more effectual Laws than those which are now in Force for that Purpose: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Penalty on Persons selling Articles of Food or Drink knowing the same to be injurious to Health.

I. Every Person who shall sell any Article of Food or Drink with which, to the Knowledge of such Person, any Ingredient or Material injurious to the Health of Persons eating or drinking such Article has been mixed, and every Person who shall sell as pure or unadulterated any Article of Food or Drink which is adulterated or not pure, shall for every such Offence, on a Summary Conviction of the same before Two Justices of the Peace at Petty Sessions in *England*, and in *Scotland* before Two Justices of the Peace in Justice of the Peace Court, or before the Sheriff Substitute of the County, or before Justices at Petty Sessions or a Divisional Justice in *Ireland*, forfeit and pay a Penalty not exceeding Five Pounds together with such Costs attending such Conviction as to the said Justices shall seem reason-

able; and if any Person so convicted shall afterwards com-  
 mit the like Offence, it shall be lawful for such Justices to  
 cause such Offender's Name, Place of Abode, and Offence  
 to be published, at the Expense of such Offender, in such  
 Newspaper or in such other Manner as to such Justices  
 shall seem desirable.

II. In the City of *London* and the Liberties thereof the  
 Commissioners of Sewers of the City of *London* and the  
 Liberties thereof, and in all other Parts of the Metropolis  
 the Vestries and District Boards acting in execution of the  
 Act for the better Local Management of the Metropolis  
 in *England* and *Ireland*, the Court of Quarter Sessions of  
 every County, and the Town Council of every Borough  
 having a separate Court of Quarter Sessions, and in *Scot-*  
*land* the Commissioners of Supply at their Ordinary Meet-  
 ings for Counties and Town Councils within their several  
 Jurisdictions, may, from Time to Time for their respective  
 City, Districts, Counties, or Boroughs, appoint and remove  
 One or more Persons possessing competent medical, chemi-  
 cal, and microscopical Knowledge as Analysts of all Articles  
 of Food and Drink purchased within the said City, Metro-  
 politan Districts, Counties, or Boroughs, and may pay to  
 such Analysts such Salary or Allowances as they may think  
 fit; but such Appointments and Removals shall at all Times  
 be subject in *Great Britain* to the Approval of One of Her  
 Majesty's Principal Secretaries of State, and in *Ireland* to  
 that of the Lord Lieutenant.

III. On the Hearing by the Justices of any Complaint  
 under this Act in any District, County, or Borough wherein  
 any Analyst shall have been appointed, the Purchaser shall  
 prove to the Satisfaction of such Justices that the Seller of  
 the Article of Food or Drink alleged to be adulterated, or  
 his Servants, had such Notice of the Intention of the Pur-  
 chaser to have such Article analysed, and also such Oppor-  
 tunity of accompanying the Purchaser to an Analyst ap-  
 pointed by this Act, as the Justices shall think reasonable,  
 in order to secure such Article from being tampered with  
 by the Purchaser.

IV. Any Purchaser of any Article of Food or Drink in  
 any District, County, City, or Borough where there is any  
 Analyst appointed under this Act shall be entitled, on Pay-  
 ment to the Analyst of a Sum not less than Two Shillings  
 and Sixpence nor more than Ten Shillings and Sixpence,  
 to have any such Article analysed by any Analyst who may  
 be appointed for such District, County, City, or Borough,  
 and to receive from such Analyst a Certificate of the Re-  
 sult of his Analysis, specifying whether in his Opinion such



Certificate  
of Analyst  
made Evi-  
dence.

Article is adulterated, and also whether it is so adulterated as to be injurious to the Health of Persons eating or drinking the same; and such Certificate duly signed by such Analyst shall, in the Absence of any Evidence to the contrary, be sufficient Evidence before the Justices or in any Court of Justice of the Matters therein certified, and the Sum so directed to be paid for such Certificate shall be deemed Part of the Costs.

Power to  
Justices to  
have Ar-  
ticles of  
Food and  
Drink  
analysed.

V. The Justices before whom any Complaint may be made under this Act may, in their Discretion, cause any Article of Food or Drink to be examined and analysed by such skilled Person as they may appoint for that Purpose, who may be required to give Evidence of the same at the Hearing of the Case; and the Expense thereof, and of such Examination and Analysis, if not paid by the Complainant or Party complained against, shall be deemed Part of the Expenses of executing this Act, but nevertheless such Expense may be ordered by such Justices to be paid by the Party so complaining or complained against, as they shall think proper.

Appeal to  
Quarter  
Sessions.

VI. Any Person who has been convicted of any Offence punishable by this Act by any Justices may appeal to the next General or Quarter Sessions of the Peace which shall be held for the City, County, Town, or Place wherein such Judgment or Conviction shall have been made, or in the Case of the Conviction having been before a Sheriff Substitute in *Scotland*, then the Appeal shall be to the Sheriff of the County, provided that such Person enter into a Recognizance within Two Days next after such Conviction, with Two sufficient Sureties, conditioned to try such Appeal, and to be forthcoming to abide the Judgment and Determination of the Court at such General or Quarter Sessions, or Sheriff, and to pay such Costs as shall be by such Court awarded; and the Justices before whom such Conviction shall be had are hereby empowered and required to take such Recognizance; and the Court at such General or Quarter Sessions, or Sheriff, are hereby authorized and required to hear and finally determine the Matter of every such Appeal, and may award such Costs to the Party appealing or appealed against as they shall think proper.

Where  
Convic-  
tion with-  
in Six  
Days of  
Quarter  
Sessions  
Time al-  
lowed for  
Appeal.

VII. If any such Conviction or Judgment or Order of Forfeiture shall happen to be made within Six Days before any General or Quarter Sessions of the Peace shall be held for the City, County, Town, or Place wherein such Conviction shall have been made, the Person who shall think himself aggrieved by any such Conviction may, on entering into a Recognizance in manner and for the Purposes before directed, be at liberty to appeal either to the then next or

next following General or Quarter Sessions of the Peace which shall be held for any such City, County, Town, or Place wherein any such Conviction shall have been made, on giving Six Days' Notice to the Complainant of his Intention to appeal.

VIII. Any Person who shall have been convicted by any Justices or Sheriff Substitute of any Offence punishable by this Act, in respect of the selling of any Article of Food or Drink which shall have been manufactured according to any Process patented before the passing of this Act, either by the Patentee or Owner of the Patent, or by any Person carrying on his business or otherwise claiming under him during the Continuance of such Patent, may, instead of appealing to the General or Quarter Sessions of the Peace or Sheriff of the County, apply in Writing within Five Days after such Conviction to the Justices or Sheriff Substitute, to state and sign a Case for the Opinion of One of the Superior Courts of Law thereon, in like Manner as under the Statute of the Twentieth and Twenty-first Years of Her Majesty, Chapter Forty-three, he might have applied to the Justices to state and sign a Case, and thereupon all such Proceedings shall take place upon and in relation to such Application, and all such Provisions shall be applicable thereto as would have taken place upon and in relation thereto, and been applicable thereto, under the Provisions of the said last-mentioned Act; and in *Scotland*, for the Purposes of such Appeal, the Justices or Sheriff Substitute may state and sign a Case for the Opinion of the Court of Session, in like Manner as the Justices in *England* and *Ireland* may, for the Opinion of the Superior Courts of Law under the said Act, and the Court of Session shall have in relation thereto the like Powers as the Superior Courts have under the said Act, and all the other Provisions of the said Act shall be applicable to such Appeals.

IX. In *England* the Provisions in the Nuisances Removal Act for *England*, 1855, as to Procedure, and the Provisions of the Act of the Eleventh and Twelfth Years of the Reign of Her present Majesty, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace and of Session within England and Wales with respect to summary Convictions and Orders*, and in *Scotland* the ordinary Rules regulating the Procedure of Justices of the Peace, so far as the same are respectively applicable, shall extend and apply to Cases arising under this Act in *England* or *Scotland*; and all Moneys arising from Penalties under this Act in any County, City, District, or Borough where there are Analysts appointed under this Act shall, when paid or recovered, be paid in *England* and *Ireland* to the Vestry,

Persons convicted of selling adulterated patented Article may have a Case stated for Opinion of Superior Court.

Procedure in Cases under this Act.

Application of Moneys.

District Board, Commissioners, County Treasurer, or Town Council for such County, City, District, or Borough respectively, to be applied for the general Purposes of such Vestry, District Board, Commissioners, County, City, or Borough respectively, and to the Collector of Rogue Money for each County in *Scotland*.

Proceedings in Ireland as to Complaints, &c., to be subject to Provisions of 14 & 15 Vict., c. 93, and 21 & 22 Vict., c. 100.

X. All Proceedings under this Act in *Ireland* as to compelling the Appearance of any such Person or of any Witness, and as to the Hearing and Determination of such Complaints, and as to the making and executing of such Orders, and as to the Applications of Fines, Amerciaments, and forfeited Recognizances imposed or levied under this Act at Petty Sessions, shall be subject in all respects to the Provisions of "The Petty Sessions (*Ireland*) Act, 1851," as the same is amended by "The Petty Sessions Clerk (*Ireland*) Act, 1858" (when the Case shall be heard in any Petty Sessions District), and to the Provisions of the Acts relating to the Divisional Police Offices (when the Case shall be heard in the Police District of *Dublin* Metropolis), so far as the said Provisions shall be consistent with any special Provisions of this Act; and when any Fine or Penalty is imposed at any of the Divisional Police Offices of *Dublin* Metropolis, or by the Justices in any Corporate Town, under the Provisions of this Act, such Fines and Penalties shall be paid over to the same Purposes and appropriated and applied in the same Manner as is now by Law authorized in respect of Fines and Penalties imposed at such Divisional Police Offices, or by the Justices in any such Corporate Town respectively.

Appeal to Quarter Sessions.

XI. In *Ireland* any Person who has been convicted of any Offence punishable by this Act may appeal to the next Court of Quarter Sessions to be held in the same Division of the County where the Order shall be made by any Justice or Justices in any Petty Sessions District, or to the Recorder at his next Sessions where the Order shall be made by the Divisional Justices in the Police District of *Dublin* Metropolis, or to the Recorder of any Corporate or Borough Town when the Order shall be made by any Justice or Justices in such Corporate or Borough Town (unless when any such Sessions shall commence within Seven Days from the Date of any such Order, in which Case, if the Appellant sees fit, the Appeal may be made to the next succeeding Sessions to be held for such Division or Town); and it shall be lawful for such Court of Quarter Sessions or Recorder, as the Case may be, to decide such Appeal, if made in such Form and Manner, and with such Notices, as are required by the Petty Sessions Acts respectively herein-before mentioned as to Appeals against Orders

made by Justices at Petty Sessions ; and all the Provisions of the said Petty Sessions Acts respectively as to making Appeals and as to executing the Orders made on Appeal, or the original Orders where the Appeals shall not be duly prosecuted, shall also apply to any Appeal or like Order to be made under the Provisions of this Act.

XII. The expense of executing this Act shall be borne, <sup>As to Expenses of executing Act.</sup> in the City of *London* and the Liberties thereof, out of the Consolidated Rates raised by the Commissioners of Sewers of the City of *London* and the Liberties thereof, in the rest of the Metropolis out of any Rates or Funds applicable to the Purposes of the Act for the Better Local Management of the Metropolis, and in Counties out of the County Rate, and in Boroughs out of the Borough Fund, or out of the Rogue Money in Counties in *Scotland*.

XIII. Nothing in this Act contained shall be held to <sup>Indictment or other Remedy not affected.</sup> affect the Power of proceeding by Indictment, or to take away any other Remedy against any Offender under this Act.

XIV. In the Construction of this Act the Words <sup>Interpretation of Terms.</sup> "Articles of Food or Drink" shall (if not inconsistent with the Context or Subject Matter) include not only all alimentary Substances, whether Solids or Liquids, but also all Eatables or Drinkables whatsoever not being Medical Drugs or Articles usually taken or sold as Medicines, but this Act shall not be construed so as to affect the ordinary Reduction of the Strength of Foreign, *British*, or Colonial Spirits by Persons licensed and paying Duties under the Excise.

#### CAP. LXXXV.

*An Act to amend Two Acts of the Seventeenth and Eighteenth Years, and of the Eighteenth Year, of Her present Majesty, relating to the Registration of Births, Deaths, and Marriages in Scotland.*—[6th August 1860.]

WHEREAS it is expedient to alter and amend the Act passed in the Seventeenth and Eighteenth Years of the Reign of Her present Majesty, intituled *An Act to provide for the better Registration of Births, Deaths, and Marriages in Scotland*, <sup>17 & 18 Vict., c. 80.</sup> and the Act passed in the Eighteenth Year of the same Reign, intituled *An Act to make further Provision for the Registration of Births, Deaths, and Marriages in Scotland* : <sup>18 & 19 Vict., c. 29.</sup> Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Certain  
Sections of  
recited Acts  
repealed.

Register of  
Neglected  
Entries.

I. Sections Eighteen, Nineteen, Forty-two, and Fifty-four of the first-recited Act, and Section One of the second-recited Act, are hereby repealed.

II. It shall be competent for any Person, on Payment of a Fee of Five Shillings, to register in a Book to be kept for the Purpose in the General Registry Office, to be called "The Register of Neglected Entries," any Birth, Death, or Marriage which shall have taken place in *Scotland* between the Thirty-first Day of *December* One thousand eight hundred and the First Day of *January* One thousand eight hundred and fifty-five: Provided always, that in order to such Registration there shall be produced to the Registrar General a Warrant to that Effect by the Sheriff of the County in which such Birth, Death, or Marriage occurred, to be granted upon a Petition, of which Intimation, by Advertisement or otherwise, shall be made as such Sheriff may direct, and after due Inquiry, and hearing any Parties having Interest who may appear to oppose such Petition, and which Warrant, and all written Documents produced to such Sheriff, together with his Notes, which such Sheriff is hereby required to take, of all parole Evidence adduced before him, shall be transmitted to the Registrar General, and shall be retained among the Records of his Office: Provided also, that a Copy of the Entry of any neglected Birth, Death, or Marriage which occurred subsequent to the Year One thousand eight hundred and nineteen shall be made and transmitted from the General Registry Office to the Registrar of the Parish or District in which such neglected Birth, Death, or Marriage occurred, and shall by him be recorded in such Form and Manner as the Registrar General may direct.

Correction  
of Errors  
in Regis-  
ters kept  
prior to 1st  
January  
1855.

III. If any Error shall be discovered in an Entry relative to a Birth, Death, or Marriage, in any Register kept and in use prior to the passing of the first-recited Act, which shall have taken place in *Scotland* after the Thirty-first Day of *December* One thousand eight hundred, it shall be lawful for the Sheriff of the County wherein the said Register is kept, upon the Application of any Person having Interest, of which Application such Intimation shall be made as the Sheriff may direct, and upon Production of such Evidence, written or parole, as the Sheriff shall deem satisfactory, to authorize the Registrar General (or the Registrar in whose Custody such Register may be at the Time) to correct the same in such Form and Manner as the Sheriff may direct: Provided that no Part of the original Entry shall be obliterated, and that the Warrant of the Sheriff authorizing the Correction and all written Documents produced to him, together with his Notes, which

such Sheriff is hereby required to take, of all parole Evidence adduced before him, shall be transmitted to the Registrar General, and shall be retained among the Records of his Office.

IV. The Provisions in the Second and Third Sections of the first-recited Act with reference to the Salaries of the Registrar General and the Secretary to the Registrar General are hereby repealed; and it shall be lawful for the Commissioners of Her Majesty's Treasury to pay to the Registrar General such Salary as that the Amount thereof and of the Salary received by him as Depute Clerk Register shall not together exceed the Sum of One thousand pounds *per Annum*, and to pay to the Secretary to the Registrar General such Salary, not exceeding Five hundred pounds *per Annum*, as shall from Time to Time be fixed by the said Commissioners, and such Salaries shall be paid out of any Moneys to be voted by Parliament for that purpose.

V. It shall be lawful for the Sheriff, if he shall think it expedient, upon a joint Application of the Parochial Board of any Parish, and of the Town Council of any Burgh situated within such Parish, or upon the Application of the Registrar General, to unite such Burgh or any Portion thereof to any Landward Part of such Parish, or to unite any Landward Part of such Parish to such Burgh or any Portion thereof, and also to regulate and determine any Questions which may arise as to the Assessments to be levied for Registration Purposes upon such Burghs or Portions of Burghs, and upon such Landward Parts of such Parishes respectively, and all Questions as to the Right to elect a Registrar for such united Districts; and it shall also be lawful for the Sheriff to regulate and determine all Questions which may arise as to such Assessment, or such Right of Election, in the Case of all Unions which shall already have been effected under the Provisions of the First Section of the second-recited Act herein-before repealed; and the Decision of the Sheriff in all such Cases shall be final, and not subject to Review in any Court or by any Process whatsoever.

VI. All existing Parochial Registers of Births or Baptisms, Deaths or Burials, and Marriages or Proclamations of Banns, which shall have been kept in every Parish prior to the First Day of *January* One thousand eight hundred and fifty-five, shall, as far as regards such Registers made and entered prior to the Year One thousand eight hundred and twenty, be transmitted, under the Direction of the Sheriff, to the Registrar General for Preservation in the General Registry Office at *Edinburgh*, and, as far as regards such Registers from the Year One thousand eight hundred

Provisions  
in Sects. 2  
and 3 of  
17 & 18  
Vict., c. 80.  
repealed  
with refer-  
ence to Sa-  
laries of  
Registrar  
General  
and Secre-  
tary.

Landward  
and Bur-  
ghal Parts  
of Parishes  
may be  
united.

All exist-  
ing Paro-  
chial Re-  
gisters be-  
fore 1820  
to be trans-  
mitted to  
Registrar  
General,  
and after  
1820 till  
1855 to  
Parish Re-  
gistrar.

and twenty inclusive to the said First Day of *January* One thousand eight hundred and fifty-five, shall be delivered over to the Custody and Care of the Person who shall have been appointed Registrar of the Parish under the first-recited Act; and where any Parish shall be divided, such last-mentioned Registers shall remain in the Custody of the Registrar of that Portion of the divided Parish wherein such Registers are at the Time of the Division; and the Registrar to whom such Registers shall be so delivered shall, if required by the Registrar General, make or cause to be made exact Inventories and Indexes thereof in so far as such Inventories and Indexes do not already exist, noticing in such Inventories any Blanks or Deficiencies therein or other Matter requiring to be noticed; and an authenticated Copy of each such Inventory, and a general Abstract of each such Index, shall be transmitted by him to the Registrar General for Preservation in the General Registry Office; and the Registers from the Year One thousand eight hundred and twenty to the said First Day of *January* One thousand eight hundred and fifty-five, hereby appointed to remain with the Registrar of the Parish, shall, at the End of Thirty Years after the said First Day of *January*, be transmitted under the Direction of the Sheriff to the Registrar General for Preservation as aforesaid; and all such Registers, and the original Inventories, Indexes, and general Abstracts, and the authenticated Copies thereof, whether in the Custody of the Registrar or Registrar General, may be searched, and certified Copies or Extracts of Entries taken therefrom, at all reasonable Times, by any Person upon Payment of the Fees authorized to be taken for the like Searches and Copies made in or taken from the Registers and Indexes appointed to be kept under the first-recited Act: Provided always, that in all Cases it shall be lawful for the Sheriff, if he shall think fit, upon a Representation to that effect, to direct that the original Burial Registers shall remain in the Custody of the Kirk Session to whom they belong, Copies of the same being furnished to the Registrar General.

Sessional  
Record to  
be restored  
to the Kirk  
Session of  
the Parish.

VII. If any of the Parochial Registers referred to shall be found to contain Entries relating to Sessional or other Matters, as well as Entries relating to Births or Baptisms, Deaths or Burials, and Marriages or Proclamations of Banns, such Entries shall be separated from the rest of the Register, under the Direction of the Registrar General, for the Purpose of being bound and delivered over to the Kirk Session of the Parish to which the Register pertains; and where it shall be impossible to effect such Separation in consequence of the Sessional or other Matter being inter-

mixed with the Entries relating to Births or Baptisms, Deaths or Burials, and Marriages or Proclamations of Banns, the whole of the Register shall remain with the Registrar General, or the Registrar of the Parish, as the Case may be: Provided, that it shall be lawful to the Kirk Session or any One acting under its Authority to have Access to and to make Copies of such Sessional or other Matter without Payment of Fees: Provided also, that where the Portion falling to be delivered to the Kirk Session shall happen to contain any Entries from which the Occurrence of a Birth or Baptism, Death or Burial, or Marriage or Proclamation of Banns may be proved, it shall be lawful for the Registrar General to cause Copies of such Entries to be made for the Purpose of this and the first-recited Act, and the Cost of making such Copies shall be defrayed in the Manner prescribed by the Fifth Section of the said first-recited Act.

VIII. With reference to the Twenty-second Section of the first-recited Act, it shall be lawful for the Sheriff, on the Receipt of a written Application to that Effect from the Registrar General, to direct that a Fire-proof Safe or other Place of Deposit shall be provided in any Parish, District, or Burgh, for the due Custody of the Registers and other Documents connected with Registration, by the Parochial Board, Heritors, or Town Council of the Parish, District, or Burgh to which such Registers pertain; and the Cost of such Safe or other Place of Deposit shall be included under the Assessment authorized to be levied by the Fiftieth Section of the first-recited Act; and further, it shall be lawful for the Parochial Board, Heritors, or Town Council of any Parish, District, or Burgh, where they shall consider it expedient, to include under the aforesaid Assessment such Sums as may be required for the Provision and Maintenance of a suitable Office for the Use of the Registrar; provided that such Office shall be situated within such Parish, District, or Burgh.

IX. The latter Portion of the Twenty-fifth Section of the first-recited Act, with reference to the annual Publication by the Sheriff of a List of Registrars and Assistant Registrars, is hereby repealed: Provided that all Elections of Registrars shall be intimated to the Sheriff as well as to the Registrar General, in the Manner prescribed by the Twelfth Section of the first-recited Act, and that due Intimation shall be made by the Sheriff of all newly appointed Registrars in such Form as he may consider expedient.

X. The Birth of any Child of *Scottish* Parents, or the Register



of Births,  
Deaths,  
and Mar-  
riages of  
Scottish  
Subjects  
occurring  
in Foreign  
Countries.

Death or Marriage of any *Scottish* Subject, which shall have taken place in any Foreign Country since the passing of the first-recited Act, if intimated to the Registrar General within Twelve Months after the passing of this Act, and the Birth of any Child of *Scottish* Parents, or the Death or Marriage of any *Scottish* Subject, which shall take place in any Foreign Country, if intimated to the Registrar General within Twelve Months after the Date thereof, in accordance, as near as may be, with the Forms prescribed in Schedule (A.), (B.), and (C.) respectively to the first-recited Act annexed, and duly certified by the British Consul of the Country or District within which such Birth, Death, or Marriage shall have taken place, shall be entered in a Book to be kept for the Purpose in the General Registry Office, to be called "The Foreign Register;" and all such Intimations shall be filed, and the relative Entries verified by the Signature of the Registrar General.

Provision  
in Sect.  
81 of 17  
& 18 Vict.,  
c. 80, as  
to the  
Signature  
of the  
Register  
by the  
Sheriff  
repealed.

XI. So much of the Thirty-first Section of the first-recited Act as requires the Signature of the Sheriff in the Register of Births, in the Cases therein referred to, is hereby repealed; and in lieu thereof the Signature of the District Examiner, appointed under the Provisions of the Third Section of the second-recited Act, shall be sufficient: Provided always, that in all such Cases, before the Examiner adhibits his Signature to the Register, the Registrar shall produce the written authority of the Sheriff for making the Registration, which shall be transmitted along with the Duplicate Registers to the Registrar General: Provided also, that the Entry of any Birth, which shall have been registered upwards of Three Months after its Occurrence, if signed by such Examiner, shall be admissible in Evidence to prove such Birth, anything in the said Section to the contrary notwithstanding.

Mode of  
reckoning  
the Period  
of "Six  
Months"  
referred to  
in Sects.  
82 & 83  
of 17 & 18  
Vict., c. 80.

XII. Whereas Doubts have arisen as to the Mode of reckoning the Period of "Six Months," referred to in the Thirty-second and Thirty-third Sections of the first-recited Act: It is hereby declared, That unless a Certificate, in the Form of Schedules (D.) or (E.) to the said Act annexed, is presented to the Registrar within Six Months after the Registration of the Birth to which such Certificate relates, it shall not be lawful for the Registrar to record the Baptismal or other Name, without the written Authority of the Sheriff endorsed upon such Certificate.

Additions  
and Altera-  
tions to  
be inserted  
in the  
Register of

XIII. The Additions and Alterations directed and authorized by the recited Acts to be made in the Duplicate Registers, instead of being given Effect to in the Manner therein prescribed, shall be inserted in the Register of Corrected Entries, referred to in the Sixty-third Section of the

first-recited Act, in such Form and Manner as the Registrar General may direct. Corrected Entries.

XIV. The Medical Certificate referred to in the Forty-first Section of the first-recited Act shall be transmitted by the Medical Person to the Registrar within Seven Days after the Death of the Person to whom it relates, instead of within Fourteen Days thereafter: Provided that in Case such Certificate shall not be so transmitted, the Registrar shall transmit to such Medical Person a Form of the Certificate prescribed by the said Act, and by a written or printed Requisition, under his Hand, shall require such Medical Person forthwith to return to the Registrar such Certificate duly filled up in Terms of the said Act; and such Certificate so filled up shall be so returned within Three Days after the Receipt thereof by such Medical Person. Medical Attendant to transmit Certificate of Death to the Registrar within Seven Days.

XV. So much of the Forty-sixth Section of the first-recited Act as provides for a copy of Schedule (C.) to the said Act annexed being given out along with the Certificate of Proclamation of Banns, and so much of the Fifty-second Section of the said Act as requires the Registrars to furnish Copies of the said Schedule to Session Clerks, are hereby repealed: Provided that in every Case of regular Marriage a Copy of the said Schedule shall, upon Production of the Certificate of Proclamation of Banns, be procured by the Parties contracting the Marriage, previous to its Solemnization, from the Registrar of the Parish or District within which such Marriage is intended to be solemnized, who shall be bound, as far as possible, to fill up the said Schedule. Provisions in Sects. 46 and 52 of 17 & 18 Vict., c. 80, as to Schedule (C.) repealed.

XVI. So much of the Fiftieth Section of the first-recited Act as requires the Examination and Verification by the Sheriff of the Registrar's half-yearly Accounts of Registrations is hereby repealed; and in lieu thereof it shall be lawful for the Parochial Board or Heritors by whom the relative Assessment is levied, to take such Proceedings as may be deemed expedient for the Purpose of ascertaining the Correctness of such Accounts. Alteration of Sect. 50 of 17 & 18 Vict., c. 80, as to Verification of Registrar's Accounts of Registrations.

XVII. It shall be lawful for the Registrar to include in his half-yearly Accounts of Registrations the Expense attending the Postage or Carriage of all Letters or Packets, and all other necessary Disbursements relating exclusively to the Execution of his Office, and for all such Expenses he shall be repaid out of the Assessment authorized to be levied by the Fiftieth Section of the first-recited Act; and the necessary Expense incurred in the Correction of an Error under the Provisions of the Sixty-third Section of the first-recited Act, where such Expenses are not paid by the Party or Parties through whose Fault such Error was committed, and where such Error was not committed through the Provision as to Payment of Registrar's Postages, &c.

Registrar's own Carelessness, shall be defrayed by the Parochial Board, and shall be included under the aforesaid Assessment : Provided that it shall be lawful for the Parochial Board to recover such Expenses from the Party or Parties through whose Fault the said Error was committed : Provided also, that where any Search or Extract shall be required by or on behalf of a Pauper, the Registrar shall be entitled to include the Cost thereof in the Account which he is required to render to the Parochial Board under the Fiftieth Section of the Act first before recited.

As to Remuneration of Registrar.

XVIII. If any Registrar shall represent to the Registrar General that his Remuneration under the Provisions of the Fiftieth Section of the first-recited Act is inadequate, the Registrar General may require the Parochial Board to increase the Sum payable to the Registrar to such Amount as the Registrar General considers necessary ; and in the event of the Parochial Board delaying or refusing to pay such increased Remuneration, it shall be lawful for the Registrar General to make a summary Application to the Sheriff, who shall, after hearing Parties and making such Inquiry as he thinks fit, determine both the Expediency of any such Increase, and the Amount thereof ; and all Expenses incurred in and with respect to such Application shall be paid by the Parochial Board, or the Registrar, as the Sheriff may determine ; and the Decision of the Sheriff in all such Applications, both on the Merits and as to Expenses, shall be final and not subject to Review in any Court or by any Process whatsoever.

Clerical Errors in the Duplicate Registers may be corrected by the District Examiners.

XIX. It shall be lawful for the District Examiners, appointed under the Provisions of the second-recited Act, to correct all such clerical Errors as may be discovered at the periodical Examination of the Duplicate Registers, subject to such Rules and Regulations as may be made by the Registrar General, with the Approbation of One of Her Majesty's Principal Secretaries of State.

Commencement of Act.

XX. This Act shall commence and take effect from and after the passing thereof, with the Exception of Sections Eleven, Thirteen, and Nineteen, and so much of Section One as provides for the Repeal of Sections Forty-two and Fifty-four of the first-recited Act, which shall not take Effect till the First Day of *January* One thousand eight hundred and sixty-one ; and the recited Acts, excepting in so far as altered by this Act, shall remain in full Force and Effect ; and this Act shall be deemed a Part of the recited Acts, and shall be read and construed therewith as if the Three Acts formed One Act.

## CAP. LXXXIX.

*An Act to extend in certain Cases the Provisions of the Superannuation Act, 1859.—[13th August 1860.]*

WHEREAS it is expedient that Provision should be made for the Grant of Superannuation Allowances to Persons who may have served both in the Office of the Secretary of State for *India*, and likewise in the permanent Civil Service of the State, within the Meaning of Section Seventeen of the Superannuation Act, 1859: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. Whenever any Person shall have been transferred from any Situation or Employment in the permanent Civil Service entitling him to Superannuation Allowance under the Superannuation Act, 1859, to any Situation or Employment in the Office of the Secretary of State for *India*, entitling him to Superannuation Allowance under Section Eighteen of the "Act for the better Government of *India*," Twenty-one and Twenty-two *Victoria*, Chapter One hundred and six, or whenever any Person shall have been transferred from any such last-mentioned to any such first-mentioned Situation or Employment, such Person shall be entitled to Superannuation Allowance calculated on his whole Service according to the Provisions of the Superannuation Act aforesaid, and such Allowance shall be paid out of the Revenues of *India* and out of the Consolidated Fund of the United Kingdom of *Great Britain* and *Ireland*, or out of Moneys voted by Parliament, in such Portions respectively as shall have been earned by such Person in the respective Services aforesaid.

## CAP. XC.

*An Act to repeal the Duties on Game Certificates and Certificates to deal in Game, and to impose in lieu thereof Duties on Excise Licences and Certificates for the like Purposes.—[13th August 1860.]*

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual

and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

After passing of this Act the Duties in respect of Certificates to kill and deal in Game as contained in 52 G. 3, c. 93, Schedule (L.), 56 G. 3, c. 56, and 1 & 2 W. 4, c. 82, repealed.

I. From and after the passing of this Act the respective Duties of Assessed Taxes now payable under the several Acts of Parliament in that Behalf in respect of Certificates to kill Game in *Great Britain*, and to deal in Game in *England*, and all the Provisions, Rules, and Directions for assessing, charging, and collecting any of the said Duties contained in Schedule (L.) of the Act passed in the Fifty-second Year of King *George* the Third, Chapter Ninety-three, and also the Duties now payable in *Ireland* under the Act passed in the Fifty-sixth Year of King *George* the Third, Chapter Fifty-six, in respect of every Certificate of having registered a Deputation as a Gamekeeper, and in respect of every Certificate to authorize any Person, not being a Gamekeeper, to kill Game in *Ireland*, and also the Nineteenth and Twentieth Sections of the Act passed in the First and Second Years of King *William* the Fourth, Chapter Thirty-two, shall respectively cease and determine, and the same are hereby repealed, except as to any Arrears of the said Duties respectively, and as to any Penalties incurred before the Commencement of this Act.

In lieu of Duties repealed, the Duties herein-named to be levied.

II. In lieu of the Duties hereby repealed there shall be granted, charged, and paid for and upon the several Licences and Certificates to take or kill Game, and Licences to deal in Game herein-after mentioned, the respective Duties or Sums of Money herein-after expressed or denoted ; (that is to say,)

£ s. d.

For a Licence in *Great Britain* or a Certificate in *Ireland* to be taken out by every Person who shall use any Dog, Gun, Net, or other Engine for the Purpose of taking or killing any Game whatever, or any Woodcock, Snipe, Quail, or Landrail, or any Conies, or any Deer, or shall take or kill by any Means whatever, or shall assist in any Manner in the taking or killing by any Means whatever of any Game, or any Woodcock, Snipe, Quail, or Landrail, or any Coney, or any Deer :

If such Licence or Certificate shall be taken out after the Fifth Day of *April* and before the First Day of *November*,

To expire on the Fifth Day of *April* in the following Year . . . . . 3 0 0

To expire on the Thirty-first Day of *October* in the same Year in which the

	£	s.	d.
Licence or Certificate shall be taken out	2	0	0
If such Licence or Certificate shall be taken out on or after the First Day of <i>November</i> , To expire on the Fifth Day of <i>April</i> following	2	0	0
Provided always, That any Person having the Right to kill Game on any Lands in <i>England</i> or <i>Scotland</i> shall be entitled to take out a Licence to authorize any Servant for whom he shall be chargeable to the Duty of Assessed Taxes as a Gamekeeper, to kill Game upon the same Lands, upon Payment of the Duty of	2	0	0
And for every Licence to deal in Game in <i>England</i> , <i>Scotland</i> , or <i>Ireland</i> , to be granted under this Act	2	0	0

III. The Duties by this Act granted shall be under the Management of the Commissioners of Inland Revenue, and shall be deemed to be Excise Duties, and all the Powers, Provisions, Clauses, Regulations, and Directions contained in any Act relating to Excise Duties or to Penalties under Excise Acts, and now or hereafter in Force, shall respectively be of full Force and Effect with respect to the Duties by this Act granted, and to the Penalties hereby imposed, so far as the same are or may be applicable, and shall be observed, applied, and enforced for and in the collecting, securing, and recovering of the said Duties and Penalties hereby granted and imposed respectively, and otherwise in relation thereto, so far as the same shall be consistent with and not superseded by the express Provisions of this Act, as fully and effectually as if the same had been herein repeated and specially enacted in this Act with reference to the said last-mentioned Duties and Penalties respectively.

Duties granted to be Excise Duties under the Commissioners of Inland Revenue.

IV. Every Person before he shall in *Great Britain* take, kill, or pursue, or aid or assist in any Manner in the taking, killing, or pursuing by any Means whatever, or use any Dog, Gun, Net, or other Engine for the Purpose of taking, killing, or pursuing any Game, or any Woodcock, Snipe, Quail, or Landrail, or any Coney, or any Deer, shall take out a proper Licence to kill Game under this Act, and pay the Duty hereby made payable thereon; and if any Person shall do any such Act as herein-before mentioned in *Great Britain* without having duly taken out and having in Force such Licence as aforesaid, he shall forfeit the Sum of Twenty Pounds.

Licence to be taken out for taking or killing Game in *Great Britain*.

Penalty for Neglect.

V. The following Exceptions and Exemptions from the Duties and Provisions of this Act are hereby made and granted; (that is to say,)

Exceptions and Exemptions.

*Exceptions.*

1. The taking of Woodcocks and Snipes with Nets or Springes in *Great Britain*.
2. The taking or destroying of Conies in *Great Britain* by the Proprietor of any Warren or of any inclosed Ground whatever, or by the Tenant of Lands, either by himself or by his Direction or Permission.
3. The pursuing and killing of Hares respectively by coursing with Greyhounds, or by hunting with Beagles or other Hounds.
4. The pursuing and killing of Deer by hunting with Hounds.
5. The taking and killing of Deer in any inclosed Lands by the Owner or Occupier of such Lands, or by his Direction or Permission.

*Exemptions.*

1. Any of the Royal Family.
2. Any Person appointed a Gamekeeper on behalf of Her Majesty by the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, under the Authority of any Act of Parliament relating to the Land Revenues of the Crown.
3. Any Person aiding or assisting in the taking or killing of any Game, or any Woodcock, Snipe, Quail, Landrail, or Coney, or any Deer, in the Company or Presence and for the Use of another Person who shall have duly obtained, according to the Directions of this Act, and in his own Right, a Licence to kill Game, and who shall by virtue of such Licence then and there use his own Dog, Gun, Net, or other Engine for the taking or killing of such Game, Woodcock, Snipe, Quail, Landrail, Coney, or Deer, and who shall not act therein by virtue of any Deputation or Appointment.
4. And, as regards the killing of Hares only, all Persons who, under the Provisions of the Two several Acts, 11th and 12th *Victoria*, Chapter 29 and Chapter 30 respectively, are authorized to kill Hares in *England* and *Scotland* respectively, without obtaining an annual Game Certificate.

Nothing  
herein to  
alter 11  
& 12 Vict.,  
cc. 29 and  
30, except  
that  
"Game

VI. Provided always that nothing herein contained shall extend to repeal, alter, or affect any of the Provisions of the said Two several Acts of the Eleventh and Twelfth Years of Her Majesty, Chapter Twenty-nine and Chapter Thirty, further than that the Term "Game Certificate" in the said Acts respectively used shall be construed to mean a Licence

to kill Game under the Provisions of this Act, and shall be so read accordingly; and that the Term "Game Certificate" used in the Act of the First and Second Years of King William the Fourth, Chapter Thirty-two, shall be construed and read in like Manner; and that wherever in the said last-mentioned Act the Duty of Three Pounds Thirteen Shillings and Sixpence on a Game Certificate is mentioned the Duty of Three Pounds on a Licence to kill Game shall be read in lieu.

VII. Any Person having the Right to kill Game on any Lands in *England* or *Scotland*, and being charged or liable to be charged to the Assessed Tax on Servants in respect of any Gamekeeper, by whomsoever deputed or appointed, and whether deputed or appointed or not, and any Person granting a Deputation or Appointment in *Great Britain* to the Servant of any other Person who shall be duly charged to the Assessed Tax on Servants in respect of such Servant, whether as Gamekeeper or in any other Capacity, with Power and Authority to take or kill any Game, shall respectively be at liberty to take out a Licence to kill Game on behalf of any such Servant, on Payment of the Duty of Two Pounds for the Year ending on the Fifth Day of *April*, and such Licence shall exempt the Servant named therein during his Continuance in the same Capacity and Service, and on his quitting such Service shall also exempt any Servant who shall succeed him in the same Service and Capacity, or who shall succeed to the Deputation of the same Manor or Royalty or Lands within the Year for which the Licence is granted, during the Remainder of such Year; and no such Servant on whose behalf a Licence shall have been duly obtained as aforesaid shall be required to obtain a Licence for himself, or be liable to any Penalty by reason of not obtaining a Licence in his own Name.

VIII. Every such Licence to kill Game taken out on behalf of any such Servant as aforesaid shall, upon the Revocation of any such Deputation or Appointment, or on his quitting the Service of the Master by whom such Licence shall have been taken out, be from thenceforth of no further Effect as to the Person named therein as such Servant, or so deputed or appointed as aforesaid; but if within the Year for which such Licence was granted the said Master, on the quitting of such Servant, shall employ another Servant as Gamekeeper in his Stead, or the Person by whom such Deputation or Appointment was made shall on the Revocation thereof make a new Deputation or Appointment to any Person in his Service, or in the Service of the same Master by whom such Licence shall have been taken out, and who



shall have been charged or be chargeable to the said Assessed Tax on Servants as aforesaid, the Officer by whom such Licence was granted, or the proper Officer appointed by the Commissioners in that Behalf, shall renew such Licence for the Remainder of that Year, on behalf of the fresh Servant or the Person so newly appointed, as the Case may be, without Payment of any further Duty, by indorsing on such Licence the Name and Place of Abode of the said last-mentioned Servant, or the Person to whom such last-mentioned Deputation or Appointment shall have been granted, and declaring the same to be a renewed Licence free of Duty.

Such Licences not available for Acts done out of Limits of the Manor or Lands for which the Parties are appointed Game-keepers. Persons doing any Act requiring a Licence to kill Game, to produce the same, on Demand, or declare their Names, Places of Residence, &c.

IX. Provided always, That no such Licence taken out for or on behalf of any Person, being such Servant or acting under a Deputation or Appointment as aforesaid, shall be available for such Person in any Suit or Prosecution where Proof shall be given of his doing or having done any Act for which a Licence is required under this Act on Land on which his Master had not a right to kill Game.

X. If any Person shall be discovered doing any Act whatever in *Great Britain* in respect whereof a Licence to kill Game is required under this Act, by any Officer of Inland Revenue, or by any Lord or Gamekeeper of the Manor, Royalty, or Lands wherein such Person shall then be, or by any Person having duly taken out a proper Licence to kill Game under this Act, or by the Owner, Landlord, Lessee, or Occupier of the Land on which such Person shall then be, it shall be lawful for such Officer or other Person aforesaid to demand and require from the Person so acting the Production of a Licence to kill Game issued to him; and the Person so acting is hereby required to produce such Licence to the Person so demanding the Production thereof, and to permit him to read the same, and (if he shall think fit) to take a Copy thereof or of any Part thereof; or in case no such Licence shall be produced to the Person demanding the same as aforesaid, then it shall be lawful for the Person having made such Demand to require the Person so acting forthwith to declare to him his Christian and Surname and Place of Residence, and the Place at which he shall have taken out such Licence; and if such Person shall, after such Demand made, wilfully refuse to produce and show a Licence to kill Game issued to him, or in default thereof as aforesaid to give to the Person so demanding the same his Christian and Surname and Place of Residence, and the Place at which he shall have taken out such Licence, or if he shall produce any false or fictitious Licence, or give any false or fictitious Name or Place, or if he shall refuse to permit any Licence which he may produce to be read, or a

Penalty for Refusal.

Copy thereof or of any Part thereof to be taken, he shall forfeit the Sum of Twenty Pounds.

XI. If any Person, having obtained a Licence to kill Game under this Act, shall be convicted of any Offence under Section Thirty of the said Act of the First and Second Years of King *William* the Fourth, Chapter Thirty-two, or under the Act of the Second and Third Years of King *William* the Fourth, Chapter Sixty-eight, the said Licence shall thenceforth be null and void.

Licence to be void if Party be convicted of any Offence under 1 & 2 W. 4, c. 32, or 2 & 3 W. 4, c. 68.

XII. The Commissioners of Inland Revenue shall, when and as they shall see fit, cause Lists of the Names and Residences of the several Persons to or for whom Licences to kill Game have been granted under this Act to be inserted in such Newspapers or published in such other Manner as to them shall seem proper, distinguishing in such Lists the Persons acting under any Deputation, Appointment, or Authority from others, and the Manors, Royalities, or Lands for which Deputations, Appointments, or Authorities have been granted, and also distinguishing the Rate of Duty paid for such Licences.

Commissioners to publish Lists of Persons licensed to kill Game.

XIII. All the Clauses and Provisions of the Two several Acts passed respectively in the First and Second Years of King *William* the Fourth, Chapter Thirty-two, and the Second and Third Years of Her present Majesty, Chapter Thirty-five, relating to the granting of Licences by Justices of the Peace to deal in Game, and to the holding of Special Sessions by such Justices in their respective Divisions or Districts for the Purpose of granting such Licences, and also all the Clauses, Provisions, and Penalties contained in the said Acts or either of them relating to Dealers in Game, and to the selling of Game, either by or to such Dealers or others, shall, so far as the same are consistent with the express Provisions of this Act, and as the same are altered or amended by this Act, extend to and be of full Force and Effect in and throughout the whole of the United Kingdom, and shall be observed, applied, and enforced as if the same, so altered or amended and made consistent with the express Provisions of this Act, had been herein repeated and specially enacted: Provided always, that no Person shall be authorized to sell Game to any licensed Dealer unless he shall have taken out a Three Pound Licence under this Act.

Provisions of 1 & 2 W. 4, c. 32, and 2 & 3 Vict., c. 85, relating to Licences to deal in Game to be in force throughout the United Kingdom.

XIV. Every Person who shall have obtained any Licence to deal in Game from the Justices of the Peace, under the Provisions of the said Two several Acts in the preceding Clause mentioned, shall annually, and during the Continuance of such Licence, and before he shall be empowered to deal in Game under such Licence, obtain a further Licence

Persons licensed by the Justices to deal in Game, to pay for and obtain a

Licence  
under this  
Act.

to deal in Game under this Act, on Payment of the Duty hereby charged thereon, and if any Person obtaining a Licence from the said Justices as aforesaid shall purchase or sell or otherwise deal in Game before he shall obtain a Licence to deal in Game under the Provisions of this Act, he shall forfeit the Sum of Twenty Pounds.

Licences  
to deal in  
Game  
under this  
Act to be  
granted  
only to  
those who  
have ob-  
tained Li-  
cences  
from the  
Justices.

List of  
Persons  
licensed to  
be kept for  
Inspection.

XV. Provided always, That no Licence to deal in Game shall be granted under the Provisions of this Act to any Person, except upon the Production of a Licence for the like Purpose duly granted to him by the Justices of the Peace, as aforesaid, and then in Force; and every Officer appointed or authorized to grant Licences to deal in Game under this Act shall in each Year make out a List, to be kept in his Possession, containing the Name and Place of Abode of every Person to whom he shall have granted or issued a Licence to deal in Game under this Act, and such Officer shall at all seasonable Hours produce such List to any Person making Application to inspect the same, and shall be entitled to demand and receive for such Inspection the Sum of One Shilling.

By whom  
Licences  
shall be  
granted,  
and Form  
thereof.

XVI. All Licences and Certificates to kill Game and to deal in Game respectively, under the Provisions of this Act, shall be in such Form as the Commissioners of Inland Revenue shall from Time to Time provide in that Behalf, and shall denote the Amount of Duty charged thereon respectively, and shall be granted, signed, and issued at the Chief Office of Inland Revenue in *London*, *Edinburgh*, and *Dublin* respectively, and by the several Supervisors of Excise in their respective Districts, or by such other Officers of Inland Revenue and at such Places as the said Commissioners shall think fit to employ and appoint respectively in that Behalf; and every such Licence shall contain the proper Christian and Surname and Place of Residence of the Person to whom the same shall be granted, with any other Particulars which the Commissioners of Inland Revenue may direct to be inserted therein, and shall be dated on the Day when the same was actually issued, and shall have Effect and be in force upon the Day of the issuing thereof, and shall expire on the Day therein mentioned for the Termination thereof.

Duration  
and Expi-  
ration of  
Licences.

5 & 6 Vict.,  
c. 81, re-  
lating to  
Game Cer-  
tificates in  
Ireland to  
continue  
in Force.

XVII. All the Clauses, Powers, Provisions, and Regulations, Pains and Penalties, contained in or imposed by the Act passed in the Fifth and Sixth Years of Her Majesty's Reign, Chapter Eighty-one, relating to Certificates to kill Game in *Ireland*, shall be of full Force and Effect and shall be applied in *Ireland* to the Certificates to be granted under this Act and the Duties hereby imposed thereon, as fully and effectually as if the same were herein repeated and specially

enacted in reference to such last-mentioned Certificates and Duties.

XVIII. Every Licence and Certificate to kill Game taken out respectively in *Great Britain and Ireland* under this Act, by or on behalf of any Person in his own Right, and not as a Gamekeeper or Servant, shall be available for the killing of Game in any Part of the United Kingdom.

XIX. The Act passed in the Seventh and Eighth Years of King George the Fourth, Chapter Forty-nine, intituled *An Act to exempt Persons who have procured Game Certificates in Great Britain from the Duty on Game Certificates in Ireland, and to authorize the Persons who have paid Duty on Game Certificates in Ireland to kill Game in Great Britain, upon paying the additional Duty only*, shall be and the same is hereby repealed.

#### CAP. XCII.

*An Act to amend the Law relative to the Scottish Herring Fisheries.*—[13th August 1860.]

WHEREAS the following Acts were passed for the Encouragement and Regulation of the *British White Herring Fishery*; that is to say, the Acts Forty-eighth *George the Third*, Chapter One hundred and ten; Fifty-first *George the Third*, Chapter One hundred and one; Fifty-second *George the Third*, Chapter One hundred and fifty-three; Fifty-fourth *George the Third*, Chapter One hundred and two; Fifty-fifth *George the Third*, Chapter Ninety-four; First *George the Fourth*, Chapter One hundred and three; First and Second *George the Fourth*, Chapter Seventy-nine; Fifth *George the Fourth*, Chapter Sixty-four; Seventh *George the Fourth*, Chapter Thirty-four; First *William the Fourth*, Chapter Fifty-four; Sixth and Seventh *Victoria*, Chapter Seventy-nine; Tenth and Eleventh *Victoria*, Chapter Ninety-one; and Fourteenth and Fifteenth *Victoria*, Chapter Twenty-six: And whereas it is expedient that the recited Acts should be amended, and that further Provision should be made for carrying into Effect the Purposes thereof: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. This Act may be cited for all Purposes as "*The Short Herring Fisheries (Scotland) Act, 1860.*"

Short  
Title.

Interpre-  
tation of  
Terms.

II. The following Words in this Act shall have the several Meanings hereby assigned to them :

The Words "the Commissioners" shall mean the Commissioners of the *British White Herring Fishery* :

The Word "Superintendent" shall mean and include the Naval Superintendent appointed under the Authority of the recited Acts or any of them, and the Superintendent or Superintendents appointed under the Authority of this Act :

The Words "Officer of the Fishery" shall mean an Officer of the *British White Herring Fishery* appointed under the Authority of the recited Acts or any of them, or this Act :

The Words "the Coasts of *Scotland*" shall mean and include all Bays, Estuaries, Arms of the Sea, and all tidal Waters within the Distance of Three Miles from the Mainland or adjacent Islands.

Commis-  
sioners  
may  
appoint  
Superin-  
tendents  
of the  
Fishery.

III. The Commissioners may from Time to Time, subject to the Approval of the Commissioners of Her Majesty's Treasury, appoint any Person or Persons to be Superintendent or Superintendents of the Fishery ; and every Superintendent so appointed shall have and be entitled to exercise all the Powers, Functions, and Privileges which can be exercised or are enjoyed under and in virtue of the recited Acts or any of them, or this Act, by the Naval Superintendent, or by the Officers of the Fishery appointed by the Commissioners of Her Majesty's Treasury, under the Authority of the Act Forty-eighth *George* the Third, Chapter One hundred and ten, except the superintending of the curing of Herrings, and the branding of Barrels containing the same ; and every Person who resists or obstructs any Superintendent in the Execution of the Duties of his Office shall be liable to a Penalty not exceeding Fifty Pounds, or, failing Payment thereof, to Imprisonment for any Period not exceeding Sixty Days.

Commis-  
sioners  
may fix  
Periods  
during  
which the  
Herring  
Fishing  
may not  
be carried  
on.

IV. It shall not be lawful to take or fish for Herrings or Herring Fry on the West Coasts of *Scotland*, between the Points of *Ardnamurchan* on the North and the *Mull of Galloway* on the South, at any Time between the First Day of *January* and the Thirty-first Day of *May* inclusive in any Year, nor between *Cape Wrath* on the North and the said Point of *Ardnamurchan* on the South at any time between the First Day of *January* and the Twentieth Day of *May* inclusive in any Year, and the Commissioners may, on Application made to them, and after such Inquiry as they shall think necessary, by Regulations to be made by them from Time to Time, fix the Periods, if any, during which it shall not be lawful to take or fish for Herrings within any other

Limits or Locality on the Coasts of *Scotland*; and every Person who takes or fishes for Herrings or Herring Fry in breach or contravention of the above Enactment or of any such Regulations shall be liable to a Penalty of not less than Five and not exceeding Twenty Pounds for every such Offence; and all Nets used for taking or fishing for Herrings in breach or contravention of the above Enactment or of any such Regulations may be seized by the Superintendent, or any Person acting under his Orders, or by any Officer of the Fishery, or by Order of any Sheriff, Justice of the Peace, or Magistrate having Jurisdiction under this Act, and shall be forfeited.

V. The Commissioners may from Time to Time make such Regulations as they think fit for the more effectual Government, Management, and Protection of the Herring Fisheries on the Coasts of *Scotland*, and for the Preservation of Order among the Persons engaged therein; and every Person who commits any Breach or Contravention of any such Regulations shall be liable to have his Boat detained by the Superintendent, or any Person acting under his Orders, or by any Officer of the Fishery, or by Order of any Sheriff, Justice, or Magistrate having Jurisdiction under this Act, and shall be liable to a Penalty of not less than Five and not exceeding Twenty Pounds for every such Offence.

Commissioners may make Regulations for the Management and Protection of the Herring Fisheries, and Preservation of Order.

VI. The Commissioners may, on Application made to them, and after such Inquiry as they shall think necessary, by Regulations to be made by them from Time to Time, prohibit on the Coasts of *Scotland*, and within such Limits and for such Periods as they may think fit, the Use of any Trawl, Drag, or Beam Net which, in the Opinion of the said Commissioners, is injurious to the Spawn of Herring, or otherwise to the Herring Fishery; and every Person who commits any Breach or Contravention of any such Regulations shall be liable to a Penalty of not less than Five and not exceeding Twenty Pounds for every such Offence: Provided that this Provision shall not in any way affect any of the Prohibitions or Requirements of any of the recited Acts, in so far as relates to fishing for Herrings.

Commissioners may prohibit the Use of Trawl, Beam, and Drag Nets.

VII. The Commissioners may from Time to Time rescind, alter, or amend any Regulation or Regulations made by them under the Authority of this Act.

Commissioners may rescind Regulations, &c.

VIII. All Regulations made by the Commissioners under the Authority of this Act shall, before taking effect, be submitted to and approved by the Commissioners of Her Majesty's Treasury, and shall thereafter be published by printed Copies thereof being posted up in conspicuous Po-

Regulations to be approved by the Lords of

the Treasury, and to be published.

sitions near the Harbours or other Places frequented by Fishermen in the Districts or Places to which the Regulations shall apply, and by printed Copies thereof being deposited with every Officer of the Fishery in such Districts or Places, and in the Office of the Sheriff Clerk of the County, and also by Advertisement inserted in some Newspaper published or circulated in such Districts or Places, either setting forth such Regulations in full, or intimating that such Regulations have been made and that Copies thereof are lodged with the Officers of the Fishery as aforesaid, all in such Manner as the Commissioners shall direct; and on such Regulations being so published it shall not be any Defence against Proceedings for the Enforcement of any Penalty or Forfeiture incurred by any Breach or Contravention thereof, that the Person charged with such Breach or Contravention was ignorant of such Regulations: Provided that such Regulations shall be so published at least Two Weeks before taking effect; and a printed Copy of any Regulation signed by the Secretary of the Commissioners for the Time being shall be Evidence of the Terms of such Regulation, and that the same has been duly published, reserving to any Person having Interest the Right to prove that the same was not so published.

Penalty under Sect. 6 of 14 & 15 Vict., c. 26, declared.

IX. Every Person committing any Breach or Contravention of the Provisions of the Sixth Section of the Act Fourteenth and Fifteenth *Victoria*, Chapter Twenty-six, shall for each Offence be liable to a Penalty of not less than Five and not exceeding Twenty Pounds for every such Offence, and every Net used in contravention of the said Act shall be forfeited.

Nets and Fishing Implements when found to be delivered to the Commissioners or their Secretary, and, unless liable to Forfeiture, to be restored to the Owners, or if not claimed to be sold.

X. All Nets, Buoys, Floats, or other Fishing Implements or Apparatus whatsoever, abandoned and found by or delivered to the Superintendent or any Officer of the Fishery, shall be held subject to the Orders and at the Disposal of the Commissioners or their Secretary, and shall, unless the same are liable to Forfeiture under the Provisions of the recited Acts or any of them, or of this Act, be restored to the Owner thereof or his Representatives, on Evidence being produced of his or their Right thereto: Provided that if the same shall not be claimed and Evidence of the Right thereto produced by the Person claiming the same within the Space of One Year, such Nets or other Implements shall, if not liable to Forfeiture as aforesaid, be sold by Public Auction by the Commissioners, and the Price thereof, after deducting Expenses, shall be accounted for to the Commissioners of Her Majesty's Treasury.

Fishing Boats and

XI. All Fishing Boats used for the Purpose of fishing for Herrings on the Coasts of *Scotland*, and the Sails and

Buoys and principal Floats of each Net, and all other Im-  
 plements of Fishery belonging to such Boats, shall be  
 marked in such Manner as the Commissioners may direct  
 by Regulations made and published as herein mentioned;  
 and every such Boat, Sail, Buoy, Net, or other Implement  
 of Fishery which shall not be so marked and numbered as  
 aforesaid may be seized by the Superintendent or any Per-  
 son acting under his Orders, or by any Officer of the  
 Fishery, or by Order of any Sheriff, Justice, or Magistrate  
 having Jurisdiction under this Act, and shall be detained  
 for such Period not exceeding One Month as the Superin-  
 tendent shall determine.

Imple-  
 ments of  
 Fishing to  
 be marked  
 and num-  
 bered, and  
 if not  
 marked  
 and num-  
 bered,  
 may be  
 seized and  
 detained.

XII. The Forty-sixth Section of the Act Forty-eighth  
 George the Third, Chapter One hundred and ten, is hereby  
 repealed; and from and after the passing of this Act the  
 Owner of every Boat which shall be employed in the Herring  
 Fishery shall paint, or cause to be painted in a distinct and  
 legible Manner upon the Stern of such Boat, in White or  
 Yellow Roman Letters of Two Inches in Length, on a  
 Black Ground, the Name of the Owner of the Boat, and  
 the Port or Place to which she belongs; and every Boat  
 employed in the Herring Fishery on which such Names as  
 aforesaid shall not be painted in Manner before directed  
 shall be detained for a Period not exceeding One Month,  
 and may be seized by the Superintendent or any Person  
 acting under his Orders, or by any Officer of the Fishery,  
 or by Order of any Sheriff, Justice, or Magistrate having  
 Jurisdiction under this Act.

Sect. 46  
 of 48 G. 3,  
 c. 110, re-  
 pealed, and  
 Names of  
 Owners  
 to be  
 painted on  
 Boats.

If Names  
 not paint-  
 ed on  
 Boats they  
 shall be  
 detained.

XIII. For the Purposes of the Provisions of the Sixth  
 Section of the Act Fourteenth and Fifteenth  
 Chapter Twenty-six, the Herring Fishery shall be held to  
 be carried on whenever Herrings are being caught, and  
 every Net, other than Drift Nets, which, in the Opinion of  
 such Commissioners, may be used for the Purpose of taking  
 Herrings in contravention of the said Act, shall during the  
 whole Time of such Herring Fishery be removed and laid  
 aside, or shall be liable to be seized and forfeited, and the  
 Owner thereof to be proceeded against accordingly; and the  
 finding of any such other Net in any open Place, and not  
 removed and laid aside as aforesaid, shall be held *prima*  
*facie* Evidence of the Purpose of the Possessor of such Net  
 to use the same in contravention of the Provisions of the  
 recited Acts, or of this Act; and unless such Possessor  
 shall prove to the Satisfaction of the Sheriff, Justice or  
 Justices of the Peace, or Magistrate, before whom he may  
 be prosecuted, that such Net was not intended to be used  
 for any such unlawful Purpose, such Net shall be forfeited

Nets other  
 than Drift  
 Nets to  
 be laid  
 aside dur-  
 ing Fish-  
 ery, and if  
 not laid  
 aside may  
 be seized  
 and for-  
 feited.



and destroyed, and the Possessor thereof shall be liable in the Penalty imposed by the Sixth Section of the said Act; and, in addition to any Superintendent or Person acting under his Orders, or any Officer of the Fishery, every Constable or Officer of the Police of any County or Burgh acting under the Authority and Orders of the Sheriff or any Justice of the Peace or Magistrate of such County or Burgh shall, for the Purpose of enforcing the Provisions of the Sixth Section of the said Act, have within such County or Burgh the Power to seize any such Net in order to the Condemnation and Forfeiture thereof; and on the Requisition of any Superintendent or other Officer of the Fishery, any Constable or Officer of Police shall be entitled to assist and co-operate with him or them in the Execution of this Act.

Mode of  
enforcing  
Fines, For-  
feitures,  
and Pen-  
alties.

XIV. It shall be lawful for the Superintendent or any Officer of the Fishery, or for the Procurator Fiscal of any County or Burgh, to apply by Petition in the Form of Schedule (A.) to this Act annexed, or as nearly so as may be, to any Sheriff, Justice of the Peace, or Magistrate having Jurisdiction in such County or Burgh, to grant Warrant to search for and seize any Net or other Fishing Apparatus prohibited by or used or intended to be used in contravention of any of the recited Acts or this Act; and any Forfeiture or Penalty imposed by or incurred under the Provisions of the recited Acts or any of them, or of this Act, may be sued for, or enforced, and recovered, with Expenses, in the Form and Manner directed or provided by the recited Acts or any of them, or by Petition or Complaint presented by or in the Name of the Secretary of the Commissioners for the Time being, or the Superintendent or any Officer of the Fishery or any Procurator Fiscal within the County or Burgh where the Offence has been committed or is to be tried, or at the Instance of any Person or Persons who may prosecute the same, to the Sheriff or any Two or more Justices of the Peace or Magistrates having Jurisdiction as herein-after provided; and where Proceedings are so taken by Petition or Complaint the same may be served by any Officer of the Law or any Officer of the Fishery; and it shall be lawful for the Sheriff, Justice, or Magistrate to summon the Person complained of to appear personally at any Time or Place to be named in the Summons; and if such Person shall not appear accordingly, then (upon Proof of the due Service of the Summons by delivering a Copy thereof to such Person, or at his usual Place of Abode to some Inmate thereat, and explaining the Purport thereof to such Inmate), either to proceed to hear and determine the Case in the Absence of such Person, or to issue

his or their Warrant for apprehending and bringing such Person before him or them, as the Case may be, or (if satisfied from Information on Oath that such Person is likely to abscond) to issue such Warrant in the first Instance without any previous Summons, and the Person in whose Name such Petition or Complaint shall be presented shall be entitled to and have the Benefit of all the Privileges, Protections, and Provisions given and conferred by any Act or Acts to or for Officers of the Customs and Excise on the Occasion of their acting in the Execution of their respective Offices, as to any Action or Suit or any Matter relating thereto; and all Penalties imposed and recovered under the Provisions of the recited Acts or any of them, or of this Act, shall be appropriated and disposed of in Terms of the Act Forty-eighth *George* the Third, Chapter One hundred and ten.

XV. It shall be competent to try all Offences under the recited Acts or any of them, or this Act, before any Sheriff or any Two or more Justices of the Peace or Magistrates having Jurisdiction in the Place where the Offence was committed, or where the Offender resides or is found, or if Offenders charged with the same Offence reside within different Jurisdictions, then before any Sheriff or any Two or more Justices of the Peace or Magistrates having Jurisdiction in the Place, or within the County or Burgh, where any One of such Offenders resides or is found; and all Orders or Warrants of Service or Citation, Judgments, Sentences, Convictions, or other Warrants of Execution, may be served or enforced upon or against any Offender, or his Goods or Effects, or any Witness, in any other County, Burgh, or Place where such Offender or Witness resides or is found, or where the Goods and Effects of any Offender are found, as well as in the County, Burgh, or Place where the same are issued, provided the same be endorsed by the Sheriff or a Justice of the Peace or Magistrate of such other County, Burgh, or Place; and such Endorsation shall be sufficient Authority to the Sheriff Officers or Constables of both Jurisdictions respectively to put such Orders, Warrants, Judgments, Sentences, Convictions, or other Warrants into execution within such other County, Burgh, or Place.

XVI. Where any Offence under the recited Acts or any of them, or this Act, shall be committed on the Coasts of *Scotland*, such Offence shall be held to have been committed within the County or either of the Counties next adjacent to the Place where such Offence was committed.

XVII. Any Petition or Complaint, and Proceedings following thereon, before the Sheriff or Justices of the Peace

Judges  
who may  
try Of-  
fences, and  
Mode of  
Enforce-  
ment of  
Orders and  
Sentences.

Jurisdic-  
tion where  
Offence  
committed  
on the  
Coasts.

Petitions,  
Orders,

and Sen-  
tences may  
be in a  
Summary  
Form as in  
Schedule  
(B.)

or Magistrates before whom any Person or Persons shall be complained of or proceeded against for any Offence under the Provisions of the recited Acts or any of them, or of this Act, and the Orders, Warrants, Judgments, Sentences, and Convictions therein, may be in a Summary Form, and may be printed or written, or partly printed and partly written, and may be in the Form of Schedule (B.) to this Act annexed, or as nearly so as may be; and the same, or Extracts thereof, signed by the Clerk of Court, shall be sufficient Authority to any Officer of the Law or Officer of the Fishery to serve such Petition or Complaint, and to any Officer of the Law to enforce such Orders, Warrants, Judgments, Sentences, and Convictions; and the same or Extracts thereof shall be endorsed as herein-before provided, if they are to be enforced in any other Jurisdiction than that in which they were issued: Provided that all Citations to Offenders shall be served at least Six Days previous to the Day of Trial therein specified.

No Record  
of Evi-  
dence ne-  
cessary,  
and Pro-  
ceedings  
not to be  
quashed or  
reviewed.

XVIII. It shall not be necessary to have any written Record of Evidence in any Petition or Complaint or Proceedings under the Provisions of the recited Acts or any of them, or of this Act; and such Petitions or Complaints, and the Orders, Warrants, Judgments, Sentences, Convictions, and Proceedings therein, shall not be quashed or vacated for Want of Form, and shall not be subject to Appeal or Review in any Court, or by any Process whatsoever except as herein-after provided.

Appeal.

XIX. It shall be lawful for any Person who shall have been found liable to any Penalty under the Provisions of any of the recited Acts or of this Act, in case such Penalty shall not be of less Amount than Ten Pounds, within Two Days of such Conviction, to require the Judge before whom he shall have been tried, or the presiding Judge if more than One, to state in Writing the material Facts of the Case, proved in Evidence at the Trial, and any Circumstances which such Judge may deem to be important with reference to the Sentence pronounced; and the Judge shall thereafter authenticate such Statement with his Signature, and deliver the same to the Defender or his Agent, and the Defender may thereupon appeal to the next Circuit Court of Justiciary, or, where there are no Circuit Courts, to the High Court of Justiciary at *Edinburgh*, in the Manner and by and under the Rules, Limitations, Conditions, and Restrictions contained in an Act passed in the Twentieth Year of the Reign of His Majesty King *George* the Second, for taking away and abolishing heritable Jurisdiction in *Scotland*, with this variation, that such Person shall, in place of finding Caution in the Terms prescribed by this Act, be

bound to find Caution to pay the Penalty or Forfeiture and Expenses awarded against him by the Sentence appealed from in the Event of the Appeal being dismissed or not insisted in, together with any additional Expenses that may be awarded by the Court on deciding or dismissing the Appeal.

XX. All Boats, Nets, Buoys, Floats, or other Fishing Implements or Apparatus which shall be forfeited under the Provisions of the recited Acts or any of them, or of this Act, or of any Regulation to be made by the Commissioners as herein provided, may be either sold by Public Auction, or destroyed by the Commissioners, as they shall think fit; and in Cases of Sale the Proceeds, after deducting Expenses, shall be accounted for to the Commissioners of Her Majesty's Treasury, or, if the Magistrate declaring the Forfeiture shall so direct, One Half thereof shall be paid to the Captor or Informer.

Boats, Nets, &c. forfeited may be sold or destroyed. As to Proceeds in Case of Sale.

XXI. It shall be lawful for any Sheriff or Justices of the Peace or Magistrates who shall try any Petition or Complaint under the Provisions of the recited Acts, or any of them, or of this Act, and who in pronouncing Sentence shall decern against any Offender for Payment of any Penalty or Expenses, to grant Warrant (failing Payment of the Penalty or Expenses so decerned for, or Security therefor being found to the Satisfaction of the Clerk of Court) for the Recovery of such Penalty and Expenses by Poinding and Imprisonment, and for imprisoning such Offender for any Period not exceeding Thirty Days, unless such Penalty and Expenses be sooner paid; and such Warrant may be carried into Execution by the Imprisonment of the Offender in any Prison within the Jurisdiction where the same was issued, or, after such Warrant is endorsed as herein provided, in any Prison within any other Jurisdiction where he may be found.

Judge may grant Warrant of Imprisonment, failing Payment of or Security for Penalty and Expenses.

XXII. Any Person found in the Act of committing any Offence in contravention of the Provisions of the recited Acts or any of them, or of this Act, and refusing, when required by any Officer of the Fishery or any Officer of Police, to state his Name and Place of Residence, may be apprehended and brought before any Sheriff, Justice of the Peace, or Magistrate having Jurisdiction, who shall forthwith examine and discharge or commit such Person until Caution *De judicio sisti* be found, as the Case may require: Provided that such Person shall not be detained more than Twenty-four Hours without the Warrant of a Sheriff, Justice of the Peace, or Magistrate for such Detention.

Persons found committing Offences may be apprehended.

XXIII. It shall be lawful for Her Majesty, Her Heirs and Successors, by Letters Patent under the Seal appointed

Her Majesty may

appoint  
Five  
additional  
Commis-  
sioners.

to be kept and used in *Scotland* instead of the Great Seal thereof, to nominate and appoint any Number of Persons, not exceeding Five, to be Commissioners of the *British White Herring Fishery*, in addition to the Commissioners appointed under the recited Acts of the Forty-eighth and Fifty-fifth *George* the Third and Tenth and Eleventh *Victoria*, and the other Acts before recited.

Limitation  
of Actions.

XXIV. No Prosecution or other Proceeding whatever shall be brought or commenced against any Person for any Offence against this Act or the recited Acts, unless the same shall be commenced within Six Months after such Offence shall have been committed.

Regula-  
tions to  
be laid  
before  
Parlia-  
ment.

XXV. All Regulations made by the Commissioners under the Authority of this Act shall, so soon as the same have been approved by the Commissioners of Her Majesty's Treasury, be laid before both Houses of Parliament forthwith, if Parliament be then sitting, or, if Parliament be not then sitting, immediately on the assembling of the then next Session of Parliament.

Act not  
to apply to  
Ireland or  
the Isle of  
Man.

XXVI. Nothing in this Act contained shall be held or construed to apply to Fishing on the coasts of *Ireland* or the *Isle of Man*.

### SCHEDULE (A.)

Unto the Honourable the Sheriff or Her Majesty's Justice or Justices of the Peace or Magistrate of the County or Burgh of

The Complaint of *A.B.*

Humbly sheweth,

That the Complainer has good Reason to believe that a Net [*or Nets or other fishing Apparatus*] prohibited by or used or intended to be used in contravention of "The Herring Fisheries (Scotland) Act, 1860," or the Acts therein recited, or one or other of the said Acts, is situate and to be found [*describe the Place*].

May it therefore please your  
grant Warrant to search for and seize the said  
Net [*or other fishing Apparatus*], to be dealt  
with in terms of the said Acts or any of them.

WARRANT [*to be endorsed on Complaint*].

[*Place and Date*.]

Grants Warrant as craved.

(Signed) *A.B.*, Sheriff.

Justice of the Peace.  
Magistrate.

# SCHEDULE (B.)

## FORMS OF PROCEEDINGS.

### COMPLAINT.

Unto the Honourable the Sheriff *or* Her Majesty's Justice *or* Justices of the Peace *or* Magistrate of the County *or* Burgh of

The Complaint of *A.B.*

Humbly sheweth,

[That *C.D.* has been guilty of a Contravention of "The Herring Fisheries (Scotland) Act, 1860," *or* of the Act [*specify the Act or Acts*] therein recited, *or* of One *or* other of the said Acts, in so far as [*here describe the Offence generally, and state the Time and Place when and where the same was committed*], whereby the said *C.D.* has incurred the Forfeiture [*or* Penalty] of \_\_\_\_\_, provided by the Section [*or* Sections] of the said Act [*or* Acts].

May it therefore please your  
to grant Warrant to summon the said *C.D.* to  
appear before \_\_\_\_\_ to answer to this  
Complaint, and to be dealt with in Terms of  
the said Acts *or* One *or* other of them.

According to Justice, &c.

[*Signed by Complainer or Informer.*]

### WARRANT.

[*Place and Date.*]

Having considered the foregoing Complaint, grants Warrant to summon the said *C.D.* complained of to compare before [*Sheriff, Justices of the Peace, or Magistrate and Place and Time*], and that by serving the said *C.D.* with a Copy of the foregoing Complaint and of this Deliverance; and also grants Warrant for citing Witnesses at the instance of both Parties, to attend at the same Place and Time.

[*Sheriff, Justice of Peace, or Magistrate.*]

### SENTENCE.

[*Place and Date.*]

The [*Sheriff, Justices of the Peace, or Magistrate*], in respect of the Evidence adduced [*or* of the Judicial Confession

of the said *C.D.*, *as the Case may be*], convicts the said *C.D.* of the Offence charged, and decerns and adjudges him to forfeit and pay to the Complainer the Sum of \_\_\_\_\_ of Penalty, with the Sum of \_\_\_\_\_ of Expenses, One Half of the said Penalty to be retained by the Complainer, and the other Half thereof [*or as the Case may be*] to be paid and accounted for by him to the Commissioners of Her Majesty's Treasury; and failing Payment by the said *C.D.* forthwith\* grants Warrant for Recovery of the said Penalty and Expenses by Poinding of his Goods and Effects, and summary Sale thereof on the Expiration of not less than Forty-eight Hours after such Poinding; appoints a Return or Execution of such Poinding and Sale to be reported within Eight Days from this Date, and in the meantime grants Warrant for detaining the said *C.D.* in the Prison of \_\_\_\_\_ until such Return be reported.

\* [*If it shall appear at the Trial that no sufficient Poinding can be made within the Jurisdiction of the Sheriff, Justices of the Peace, or Magistrate, say here, "and in respect it appears that no sufficient Poinding and Sale can be had whereon to levy the said Penalty and Expenses, grants Warrant to imprison the said C.D. in the Prison of \_\_\_\_\_ for the Space of \_\_\_\_\_ from this Date, unless the said Penalty and Expenses be sooner paid, and decerns."*]

#### SENTENCE OF FORFEITURE.

The [*Sheriff, Justice of the Peace, or Magistrate*], in respect of the Evidence adduced [*or of the Judicial Confession of the said C.D., as the Case may be*], finds that a Net [*or Nets or other Fishing Apparatus*] prohibited by or used or intended to be used in contravention of "The Herring Fisheries (Scotland) Act, 1860," or of the Act [*specify the Act*] therein recited, has been forfeited in Terms of the said Act or Acts, and declares the same to be forfeited accordingly [*and further, if the Magistrate see Cause, appoints One Half of the Proceeds thereof, when sold, to be paid to E.F., the Captor or Informer.*]

#### WARRANT OF IMPRISONMENT.

*To be granted in Case of a Return being made that no sufficient Goods and Effects could be found.*

[*Place and Date.*]

The [*Sheriff, Justice of the Peace, or Magistrate*], in respect of the Return made that no sufficient Effects can be

found whereon to levy the said Penalty and Expenses, grants Warrant to imprison the said *C.D.* in the Prison of \_\_\_\_\_ for the Space of \_\_\_\_\_ from this Date, unless the said Penalty and Expenses be sooner paid, and decerns.

## WARRANT OF LIBERATION.

[Place and Date.]

The [*Sheriff, Justice of the Peace, or Magistrate*], in respect of the Return of a sufficient Poinding and Sale of the Effects of the said *C.D.* [or in respect of Payment having been made of the said Penalty and Expenses, *as the Case may be*], grants Warrant to the Keeper of the Prison of \_\_\_\_\_ for the immediate Liberation of the said *C.D.*, and decerns.

## CAP. XCV.

*An Act to facilitate the building of Cottages for Labourers, Farm Servants, and Artisans, by the Proprietors of entailed Estates in Scotland.*—[13th August 1860.]

WHEREAS an Act was passed in the Tenth Year of the Reign of His Majesty King George the Third, intituled *An Act to encourage the Improvement of Lands, Tenements, and Hereditaments in that Part of Great Britain called Scotland held under Settlements of strict Entail*, by which Act it was, *inter alia*, provided that every Proprietor of an entailed Estate who should lay out Money in enclosing, planting, or draining, or in erecting Farmhouses and Offices or Outbuildings for the same, for the Improvement of his Lands and Heritages, should be a Creditor to the succeeding Heirs of Entail for Three Fourth Parts of the Money laid out in making the said Improvements; and the said Act contains various Provisions for determining the Amount and regulating the Recovery of the aforesaid Proportion of the Sums expended upon such Improvements: And whereas the Provisions of the said Act have been in certain respects amended by Two Acts, the one passed in the Session of Parliament holden in the Eleventh and Twelfth Years of the Reign of Her present Majesty, intituled *An Act for the Amendment of the Law of Entail in Scotland*, and the other passed in the Session of Parliament holden in the Sixteenth and Seventeenth Years of the Reign of Her present Majesty,

10 G. 3, c. 51.

11 & 12  
Vict., c. 36



16 & 17  
Vict., c. 94. intituled, *An Act to extend the Benefits of the Act of the Eleventh and Twelfth Years of Her present Majesty, for the Amendment of the Law of Entail in Scotland*: And whereas the Second and Third recited Acts contain various Enactments providing that Monies or Balances of Monies derived from the Sale of Portions of entailed Estates, or of Rights or Interests in or concerning such Estates, or in respect of permanent Damage done thereto, and Monies or Balances of Monies invested or held in trust for the Purpose of purchasing Lands to be entailed, may, under the Authority of the Court of Session, be applied, *inter alia*, in permanently improving such entailed Estates or Lands, or in Repayment of Money already expended in such Improvements: And whereas it is expedient to facilitate the Erection of Cottages for Labourers, Farm Servants, and Artisans by the Proprietors of entailed Estates in *Scotland*: And whereas Doubts are entertained how far the Erection of such Cottages is within the Provisions of the said Act of the Tenth Year of His Majesty King *George* the Third: Be it therefore declared and enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Provisions  
of recited  
Acts as to  
Improvements  
of entailed  
Estates to  
include  
Erection of  
Cottages.

I. All the Provisions of the recited Acts which relate or apply to Improvements of entailed Estates shall be held and construed as including and applying to the Erection of Cottages for the Labourers, Farm Servants, and Artisans upon such Estates, in the same Manner in all respects as if the Erection of such Cottages had been specified in the Ninth Section of the first-recited Act among the other Improvements therein mentioned.

Erection of  
Cottages to  
be held as  
permanent  
Improvements  
contemplated  
by 11 & 12  
Vict., c. 86,  
and 16 & 17  
Vict., c. 94.

II. The Erection of Cottages for the Labourers, Farm Servants, and Artisans upon Entailed Estates, or upon Lands towards the Improvement of which such Monies or Balances of Monies as aforesaid are applicable under the Powers of the Second and Third recited Acts, shall be held to be one of the permanent Improvements of such Estates or Lands contemplated by the Second and Third recited Acts; and all the Provisions of those Acts which relate to permanent Improvements of such Estates or Lands shall be held and construed as including and applying to the Erection of such Cottages.

Court or  
Sheriff to  
be satisfied  
that entailed  
Estates  
will be permanently

III. Provided always, That nothing in this Act contained shall authorize the Creation of any Charge upon entailed Estates, or against succeeding Heirs of Entail, in respect of the Erection of Cottages, or shall authorize the Application towards the Erection of Cottages of any Monies in

which succeeding Heirs of Entail are interested, unless the Court before which Proceedings in pursuance of the recited Acts, or any of them, shall be taken shall be satisfied that the said Estates or the succeeding Heirs of Entail will be permanently benefited to the Extent of the Charge so created or Monies so applied, and that the Cottages in respect of which such Charge is created, or towards the Erection of which such Monies are applied, have been completed in a proper and substantial Manner.

## CAP. XCVI.

*An Act to amend the Police of Towns Improvement Act, so as to enable Towns and populous Places in Scotland to avail themselves of its Provisions for sanitary and other Improvements, without at the same Time adopting its Provisions as regards the Establishment and Maintenance of a Police Force.*—[13th August 1860.]

WHEREAS an Act was passed in the Thirteenth and Fourteenth Year of the Reign of Her present Majesty, Chapter Thirty-three, intituled *An Act to make more effectual Provision for regulating the Police of Towns and populous Places in Scotland, and for paving, draining, cleansing, lighting, and improving the same*: And whereas it is expedient to amend certain Provisions contained in the said Act, and to extend the same in manner herein provided: Be it enacted by the Queen's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. The Householders of any Burgh, Town, or populous Place, as defined in the said recited Act, may adopt the Provisions of the said Act relating to any Matter or Thing thereby provided for and authorized to be adopted, or to any One or more of the said Matters or Things, although they do not adopt the Provisions relating to the Establishment and Maintenance of a Police Force within such Burgh, Town, or populous Place, in the Manner required by the said Act.

II. The said recited Act shall be held to extend and apply to Two or more contiguous Burghs, Towns, or populous Places as defined in the said Act; and it shall be lawful for such contiguous Burghs, Towns, or populous Places to unite in adopting the Provisions of the said Act, either in whole or in part, as authorized by this Act; and

such Burghs, Towns, or populous Places shall, when so uniting, be held to form one Burgh, Town, or populous Place for the Purposes of the said Act and this Act.

Annual  
Accounts  
may be  
made up for  
the Year  
ending at  
Whitsun-  
day, and  
One Audi-  
tor to be  
sufficient.

III. It shall be lawful for the Commissioners for any such Burgh, Town, or populous Place to make up their yearly Accounts under the said Act for the Period extending from the Term of *Whitsunday* in one Year to the Term of *Whitsunday* ensuing in the next Year, and to lay such Accounts before the Statutory Meeting of Commissioners in the Month of *August* in each Year, and such Commissioners may, if they see fit, nominate One Auditor only, in place of Two.

Commis-  
sioners  
may bor-  
row on  
Security of  
Assess-  
ments due  
and unpaid.

IV. It shall be lawful for the Commissioners, if they shall find it necessary in any Year to make Disbursements for the Purposes of the recited Act beyond the Amount recovered of Assessments actually made and applicable to the Expenditure of such Year, to borrow Money on the Security of such Part of the Assessments as shall be due and unpaid, but not to an Amount greater than One half of such Part; and when any Money has been so borrowed it shall not be competent thereafter to borrow on the Security of any other Assessments leviable under the said Act until the Money so borrowed shall have been paid off; but nothing herein contained shall affect the Three hundred and fortieth Section of the said Act.

Proprie-  
tors may  
redeem  
Sewer  
Rates with-  
out being  
liable for  
future In-  
terest on  
Debt.

V. At any Time before the Expiration of the Period for paying off any Loan contracted by the Commissioners, and any Expenses for which any General Sewer Rate or Assessment or any Special District Sewer Rate or Assessment has been made, the Owner or Occupier of the Premises assessed may redeem the future Assessment leviable in respect of such Premises, without being chargeable with any of the future Interest on the Debt.

Recited Act  
and this  
Act to be  
construed  
together.  
Short Title.

VI. The Provisions of the said Act, so far as the same are not inconsistent with the Enactments herein-before contained, shall be construed with such Enactments as one Act.

VII. This Act may be cited as "The Police of Towns (*Scotland*) Amendment Act, 1860."

#### CAP. CV.

*An Act to provide for the Management of the General Prison at Perth, and for the Administration of Local Prisons in Scotland.*—[20th August 1860.]

WHEREAS an Act was passed in the Second and Third Year of the Reign of Her present Majesty, intituled *As*

*Act to improve Prisons and Prison Discipline in Scotland*; 2 & 3 Vict., c. 42. and another Act was passed in the Seventh and Eighth Year of the Reign of Her present Majesty, intituled *An Act to amend and continue, until the First Day of September One thousand eight hundred and sixty-one, and to the End of the then next Session of Parliament, the Law with respect to Prisons and Prison Discipline in Scotland*; and another Act was passed in the Fourteenth and Fifteenth Year of the Reign of Her present Majesty, intituled *An Act to amend certain Acts for the Improvement of Prisons and Prison Discipline in Scotland*: And whereas it is expedient that the Laws for the Administration of Prisons in Scotland should be consolidated and amended: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. From and after the Thirty-first Day of December One thousand eight hundred and sixty, the recited Acts shall be and are hereby repealed, and this Act shall commence and take Effect.

II. The Repeal of the recited Acts shall not be held to repeal or in any way affect the Enactments of an Act passed in the Twentieth and Twenty-first Year of the Reign of Her present Majesty, intituled *An Act for the Regulation of the Care and Treatment of Lunatics, and for the Provision, Maintenance, and Regulation of Lunatic Asylums in Scotland*; and where in any Enactments of the last-recited Act, or of any other Act which shall continue in Force after the Commencement of this Act, any of the Acts hereby repealed is cited or referred to, such Enactments shall be interpreted as if this Act were cited or referred to therein.

III. This Act may be cited for all Purposes as "The Prisons (Scotland) Administration Act, 1860."

IV. The following Words and Expressions used in this Act shall in the Construction thereof be interpreted as follows, except where the Nature of the Provision or the Context shall be repugnant to such Construction:

The Word "Prisons" shall include all legal Prisons under this Act, whether administered by the Managers appointed in Terms of this Act, or by County Boards, but shall not include Military Prisons, Police Cells, or other Places of Detention not administered either by such Managers or by a County Board:

"Local Prisons" shall include all Legal Prisons under this Act, not administered by the said Managers:

The Expression "Classes of Prisoners for which a Prison is legal" shall include all Descriptions of Civil and

14 & 15  
Vict., c. 27.

Recited  
Acts re-  
pealed,  
and this  
Act to  
take Effect.

Repeal  
not to  
affect  
20 & 21  
Vict., c. 71.

Short  
Title.

Interpreta-  
tion of  
Terms.

Criminal Prisoners, other than such as are expected in the Declaration, Order, or other Proceeding by which the Prison is rendered legal :

“Burgh” shall include and apply to the Cities, Burghs, and Towns which are Royal Burghs, or which send or contribute as Burghs to send a Member to Parliament :

“Town Councils” shall include the Lord Provost, or Provost or Chief Magistrate, and Magistrates and Council of Burghs :

“Magistrates” shall include the Administrators of the Affairs of a Burgh :

“Sheriff” shall include Sheriff Substitute :

“Landward Part of a County” shall include and apply to a County exclusive of the Burghs situated therein :

“Civil Prisoner” shall include all Persons imprisoned for Civil Debts due to Subjects; Prisoners for Debts or Taxes due to the Crown, not being Fines or Penalties inflicted on Conviction of Offences; Prisoners on Meditatione fugæ Warrants granted at the Instance of Creditors for Performance of Civil Obligations; Prisoners Ad factum præstandum; Prisoners until they find Caution to return to Service; and Prisoners until they find Caution under Writs of Law Burrows :

“Criminal Prisoner” shall include all other Descriptions of Prisoners :

“Administrators of a Prison” shall mean either the Managers of the General Prison or a County Board, as the Case may be :

“Medical Practitioner” shall mean a Person registered in Terms of an Act passed in the Twenty-first and Twenty-second Year of the Reign of Her present Majesty, intituled *An Act to regulate the Qualifications of Practitioners in Medicine and Surgery*, and an Act passed in the Twenty-second Year of the Reign of Her present Majesty, intituled *An Act to amend the Medical Act (1858)*.

Appoint-  
ments,  
Claims,  
and Obligations  
under re-  
pealed  
Acts to  
continue.

V. All Appointments made under the recited Acts, except in, so far as the same are superseded by this Act, shall remain until the same are legally revoked or altered; and all Claims which have been created, and all Obligations and Penalties which have been incurred under the said Acts, and are not superseded by this Act, shall continue to be effectual; and all Orders lawfully made but not fulfilled, and all Matters left incomplete by the Repeal of the said Acts, shall be brought to a Conclusion under

this Act, except in so far as the same are superseded thereby.

#### RULES FOR PRISONS.

VI. All Rules for Prisons in *Scotland* which have been certified under the Hand of One of Her Majesty's Principal Secretaries of State, and have not been superseded by other Rules so certified, shall, except in so far as the same are superseded by this Act, be the Rules for Prisons in *Scotland*, and as such shall be binding on all Persons whom they may concern.

Rules as existing to continue until altered.

VII. When the Words "General Board" are used in such Rules, in applying the same to Local Prisons, the Words "One of Her Majesty's Principal Secretaries of State" shall be substituted therefor: Provided that the Intimation required by such Rules to be made of an Escape or of a sudden Death shall be made to the Crown Agent.

Secretary of State to be substituted for General Board of Prisons in Rules.

VIII. Where in any Prison any Relaxation or Modification of any of such Rules shall before the Commencement of this Act have been authorized by the General Board of Directors of Prisons, such Rules shall be enforced in such Prison subject to such Relaxation or Modification, until the same are revoked by the Adoption of any new Rules under the Provisions of this Act.

Authorized Relaxations or Modifications of Rules to continue.

IX. It shall be lawful at any Time for One of Her Majesty's Principal Secretaries of State to alter, modify, or supersede any Rule applicable at the Time to any Prison in *Scotland*, and all Rules, whether applicable to particular Prisons therein named or applicable to Prisons in *Scotland* generally, issued under the Hand of One of Her Majesty's Principal Secretaries of State, shall be specially communicated to the Administrators of every Prison to which they apply and published in the *Edinburgh Gazette*, and shall thereafter be binding on all Persons whom they may concern.

Secretary of State empowered to alter Rules, or make new Rules.

#### COUNTY PRISON BOARDS.

X. There shall be in each County a County Prison Board; provided that for the Purposes of this Act *Orkney* and *Zetland* shall as heretofore be taken to be separate Counties; and the several County Boards in existence at the Commencement of this Act shall continue to be the County Boards under this Act until the First Appointment of County Boards under the Provisions thereof.

County Board for each County; and *Orkney* and *Zetland* taken to be separate.

XI. The County Boards shall be chosen by the Commissioners of Supply of the several Counties, and by the Magis-

County Boards to

be chosen by Commissioners of Supply and Magistrates of Burghs, and to consist of Numbers set forth in Schedule (A.)

trates of certain Burghs, and the Board of each County shall consist of the Number of Members set forth in reference to such County in the Schedule (A.) annexed to this Act, and shall be chosen by the Commissioners of Supply of each County, or by such Commissioners and the Town Council of any Burgh or Burghs situated in the County, according to the Proportion set forth in the said Schedule: Provided that the Sheriff, and in his Absence One Sheriff Substitute, of the County shall, in addition to the Members so chosen, be *ex officio* Members of the County Board; and where there is more than One, the Sheriff Substitute whose Appointment is the earliest in Date shall be such Member.

As to Election of County Boards.

XII. The Commissioners of Supply of each County shall elect such Number of Members of the County Board as they are by this Act authorized to elect, at their Annual Meeting held on the Thirtieth Day of the Month of April, or on the first lawful Day thereafter, in the year One thousand eight hundred and sixty-one, and in every subsequent Year; and the Town Councils of the several Burghs authorized to elect Members of County Boards shall also elect such Number of Members as they are by this Act authorized to elect in the Month of April One thousand eight hundred and sixty-one, and in every subsequent Year; and the Members of every County Board shall remain in Office until the First Meeting of the Board elected in the ensuing Year, and at each new Election any Member of such Board may be re-elected.

Meetings of County Boards.

XIII. Each County Board shall hold their First Meeting at such Place within the County as may be fixed by the Sheriff, and on such Day not earlier than the Day on which the Commissioners of Supply hold their Annual Meeting in April, and not later than the Month of May, as the Sheriff shall fix; and of the Day and Place of such Meeting due Notice shall be given in Two Newspapers in general Circulation in the County; and such Meeting may be adjourned: and at such Meeting each County Board shall elect One of their own Number to be their Chairman and Convener: provided that until such Chairman is elected the Sheriff of the County, or in his Absence the Sheriff Substitute, shall be Chairman, and the Chairman shall, in case of an Equality of Votes, have a double or Casting Vote; and each County Board shall from Time to Time hold their Meetings at some Place within the County, and shall from Time to Time fix the Rules by which their Proceedings shall be governed; and each County Board may appoint Committees of their own Number for the Management of the several Prisons within the County, or for the Performance of the several Duties required to be performed by such Board, and fix the Quorum

Chairman.

Committees and Quorum of County Boards.

thereof, and may delegate to such Committees such Powers as they may think fit, the same being expressed in the Minute of their Appointment; and Three shall be a Quorum of such County Boards.

XIV. On or before the Day of the First Meeting of each County Board the Clerk thereof shall transmit to One of Her Majesty's Principal Secretaries of State, a Statement of the Name and Place of Abode of each Member of such County Board.

*Lists of County Boards to be transmitted to Secretary of State. Powers and Duties of County Boards.*

XV. In every County the County Board shall have the immediate Superintendence and Management of the Local Prisons therein, in Terms of this Act and of the Rules in Force for the Time being in virtue of the same; and such Superintendence and Management shall include the building, altering, and repairing the said Prisons, the transferring the Site of any Prison to be rebuilt from one Part of the County to another, providing Food and all other Articles of Consumption used therein, furnishing Instruction and Employment to the Prisoners, and the Appointment of Keepers, Chaplains, Medical Officers, Clerks, and Teachers, and all other Persons proper to be employed in the Prisons under their Administration: Provided always, that the Chaplains to be so appointed to the General Prison and Local Prisons aforesaid shall be Ministers or Licentiates of the Church of *Scotland*.

XVI. Each County Board shall appoint a Clerk of the Board, and may when necessary appoint Assistant Clerks, and appoint a Treasurer; and the Persons so appointed shall perform all such Duties connected with their respective Offices as they may be directed by the County Board to perform with a view to carrying this Act into Effect.

*Appointment of Clerks and Treasurer.*

XVII. Each County Board shall from Time to Time fix the Salaries and Allowances of the several Persons in their Employment; and all Persons in their Employment shall hold their Appointments at the Pleasure of the Board, and shall be liable to be at any Time dismissed by the Board, and on such Dismissal shall be bound immediately to vacate any Premises belonging to the Board occupied by them.

*Offices under County Boards to be held at Pleasure.*

XVIII. It shall be lawful for any County Board, if they think fit, to pay to any Officer or other Person in the Employment of the Board, who by reason of Age, Infirmary, or Disease has become unable properly to discharge his Duties, a retiring Allowance not exceeding the Scale prescribed in Section Two of an Act of the Twenty-second Year of Her present Majesty, intituled *An Act to amend the Laws concerning Superannuations and other Allowances to Persons having held Civil Offices in the Public Service*, and such

*Power to County Boards to grant retiring Allowances as prescribed in 22 Vict. c. 26.*



Allowance, when granted, shall be a Charge on the Assessment for current Expenses : Provided always, that it shall not be lawful to grant such retiring Allowance to any Person under Sixty Years of Age, unless upon Medical Certificate, on Soul and Conscience, under the Hands of Two Medical Practitioners, that such Person is incapable from Infirmary of Mind or Body to discharge the Duties of his Office, and that such Infirmary is likely to be permanent.

Secretary  
of State  
may dis-  
miss Per-  
sons em-  
ployed by  
County  
Boards,  
or in  
Prisons.

Prisons  
and other  
Property  
of ex-  
isting  
Boards  
vested in  
County  
Boards  
under  
this Act.

County  
Boards  
may ac-  
quire Pro-  
perty, sue  
and be  
sued, &c.

XIX. Any Person in the Employment of any County Board or employed in any Prison in *Scotland* may at any Time be dismissed by an Order in Writing under the Hand of One of Her Majesty's Principal Secretaries of State, after such Inquiry as to him may seem proper, and it shall not be lawful to pay a retiring Allowance to any Person who has been so dismissed.

XX. All Local Prisons, all Heritable and Moveable Property, all Moneys, Goods, and Effects, and all Rights of Action possessed by County Boards at the Commencement of this Act, shall be vested in and be possessed by the County Boards respectively under this Act, until such Possession shall be altered by due Course of Law; and all Local Prisons hereafter built, and all Lands and Tenements acquired by County Boards for the Purposes of such Local Prisons, shall be the Property of the Prison Board of the County within which the same are situated.

XXI. The several County Prison Boards may acquire and hold Heritable and Moveable Property, Moneys, Goods, and Effects; and all Titles, Securities, and Investments and Evidences taken for the same, may be taken to the said Boards by the Name and Description of the Prison Board of the County wherein the same shall be established without further Description; and all Property, Moneys, Goods, and Effects which shall have been or may be so vested, and the Titles and Securities thereof, shall be deemed to be held for the Use of such Boards for the Time being, and shall pass and be transmitted to such Boards for the Time being, without the Necessity of any Conveyance or Assignment from one Board to another; and every County Board may, for all Purposes of Civil or Criminal Action or Diligence, or Reference or Arbitration, institute, defend, or enter into Civil or Criminal Proceedings in the Name of the Board or of their Clerk for the Time being; and no such Proceeding shall discontinue or abate by reason of any Vacancy in any of the said Offices, but may be insisted in, to all Intents and Purposes, in the Name of the Board or of their Clerk for the Time being.

Members  
of County

XXII. No Member of any County Board shall derive any Profit or Emolument, directly or indirectly, for himself

or any Partner, from his Office, or from the Expenditure made by the Board of which he shall be a Member in the Execution of this Act, nor shall he be personally liable for anything done by him *bonâ fide* in virtue of his Office in the Execution of this Act or in the Exercise of the Powers hereby conferred; and no Sheriff or other Judge shall be disqualified from acting as such in any Civil or Criminal Proceedings which may be brought before him by reason of being a Member of any such Board.

XXIII. The Commissioners of Supply and the Town Councils of Burghs authorized to appoint Members of County Boards shall severally have Power from Time to Time to supply any Vacancies which may occur in their Appointment of Persons to form a County Board; and it shall be lawful for each County Board from Time to Time to supply any Vacancy which may occur in the Office of their Chairman and Convener; and it shall not be held to invalidate the Acts of any County Board that any Commissioners of Supply or Town Councils of Burghs have failed duly to appoint the several Numbers of Persons authorized to be appointed by them as Members of County Boards, and each County Board may act if Three Members thereof shall assemble.

XXIV. In case any Convener or Commissioners of Supply of Counties, or Persons appointed or directed by them, or any Town Councils of Burghs, or Persons appointed or directed by them, or any County Board, or Persons appointed or directed by them, shall refuse or neglect to do what is herein required of such Persons respectively, or in case in any County there shall be no County Board, or in case a County Board shall refuse or neglect to carry this Act into Effect, or in case any Obstruction shall arise in the Execution of this Act, it shall be lawful for the Lord Advocate of Scotland to apply by Summary Petition to the Court of Session, or during the Vacation of the said Court to the Lord Ordinary on the Bills, and the said Court and Lord Ordinary are hereby authorized and directed in such Case to do therein as to such Court or Lord Ordinary shall seem just and necessary for the Execution of the Purposes of this Act.

#### LOCAL PRISONS.

XXV. The several Prisons which under the Powers of the recited Acts have heretofore been administered by County Boards, and shall exist as legal Prisons at the Commencement of this Act, shall, for the several Purposes and for the several Classes of Prisoners for which they were legal

at the Commencement of this Act, continue to be legal Prisons until their Condition as such shall be altered under the Provisions of this Act; and every Declaration by the General Board of Directors of Prisons, or other Procedure rendering a Prison legal which shall be effectual at the Commencement of this Act, shall continue to be effectual, and shall be binding on all Persons concerned, as if the same formed Part of this Act, until such Declaration or other Procedure shall be revoked or altered under the Provisions of this Act.

No material Alteration to be made without Consent of Secretary of State.

Secretary of State may alter legal Condition of a Prison, or legalize new Prison.

Procedure when there is no Prison for all Descriptions of Prisoners in any County.

Procedure when Prisoners are committed

XXVI. No Transference of a Prison to a new Site shall be competent, and no Addition shall be made to the Accommodation of any Prison, and no Part of any Prison shall be taken down to the Effect of altering the Accommodation thereof, unless with the Consent in Writing of One of Her Majesty's Principal Secretaries of State.

XXVII. It shall be lawful for One of Her Majesty's Principal Secretaries of State, by an Order under his Hand, to render any Local Prison no longer a legal Prison, or to alter the Classes of Prisoners for which any Local Prison is a legal Prison, or to render any new Building a legal Prison for the Classes of Prisoners included in such Order; and every such Order shall be published in the *Edinburgh Gazette*, and in Two Newspapers circulating in the District to which it applies, and shall be effectual on and after a Day named therein subsequent to such Publication.

XXVIII. When the Terms of any Order affecting the Classes of Prisoners for which a Prison is legal are such that when it comes in force there shall cease to be in the County to which it applies a legal Prison for all Descriptions of Civil and Criminal Prisoners, a Prison in some neighbouring County shall be named in such Order to which all Prisoners who would otherwise be confined in such first-mentioned Prison, but cannot be so by reason of the Change in the Classes of Prisoners for which it is legal, shall be removed, and all such Prisoners shall be removed in Terms of such Order by the Prison Board of the County from which they are removed as if the Removal were to another Prison in the same County; and the Expense of the Removal of such Prisoners, and of their Maintenance and Detention in the Prisons to which they are removed, shall be a Charge on the Assessment for current Expenses of Prisons in the County from which they are removed; and in case of Dispute the Amount of such Charge shall be fixed by the Crown Agent.

XXIX. When a Prisoner, having been convicted of an Offence, shall be committed until he pay a Penalty, or perform any other Act, to a Prison which is only legal for the

carrying out of Sentences of certain short fixed Periods, it shall be lawful for the County Board to remove him to another Prison, as if he had been committed under a Sentence for a Period beyond that which could be lawfully carried out in the Prison to which he is committed.

XXX. When any Judge or Magistrate having Jurisdiction within any Burgh, Town, or Place forming Part of a County shall in the legal Exercise of his Jurisdiction grant a Warrant for the Imprisonment of any Person, and within the Bounds over which his Jurisdiction extends there is either no Prison or only a Prison in which, by reason of the Classes of Prisoners for which it is legal, such a Warrant cannot be carried into Effect, it shall be lawful for such Judge or Magistrate to direct that the same shall be carried into Effect in any other Prison within the County, and the Warrant shall thereupon be as effectual as if the Prison named therein were within the Bounds of such Judge or Magistrate's Jurisdiction.

XXXI. In case any Local Prison or a Part thereof shall be discontinued by ceasing to be a legal Place of Confinement under this Act, the County Board may sell the same for such Price as they may obtain therefor and convey the same to the Purchaser: Provided always, that when the Building so discontinued as a Prison forms Part of any Building used for other Purposes, the First Offer of the same shall be made to the Persons having Right to the other Parts of the Building at such Price as may be agreed on, or in case of Disagreement as may be fixed by Valuers appointed by the Sheriff of the County: Provided also, that the County Board may give up any Building so discontinued as a Prison, or any Part of the Ground or Buildings belonging to them, which may not be required for their Prisons, without receiving any Price therefor, if the same is to be used for the Purposes of Court Buildings or of a Reformatory or a Police Office Station House or Lock-up.

#### ASSESSMENTS.

XXXII. The Salaries of the several Persons in the Employment of the County Board, the Expense of the Maintenance of Prisoners in the Local Prisons within the County, and generally the current Expenses of the Administration of such Prisons, shall be defrayed by Assessment upon the County and the Burghs situated therein; and such Assessment shall be of such Amount as the County Board shall from Year to Year fix and determine at a Meeting to be held for that Purpose, which may be either at any Meeting to be held for that Purpose in the Month of March

or *April*, or at any other Meeting held not later than the Month of *September* in every Year; and such Assessment shall be called the Assessment for current Expenses: Provided that where a Prisoner shall be confined in the Prison of any County not being the County in which the Crime for which the Prisoner has been so confined was committed, such County shall be paid by the County within which the Crime was committed the Expense of maintaining such Prisoner during such Confinement, and in case of Dispute the Amount of such Payment shall be fixed by the Crown Agent.

Building  
Asses-  
ment.

XXXIII. At any Meeting to be held for that Purpose, which may be either the First Meeting of the Board after their Appointment or any other Meeting held not later than the Month of *September* thereafter, the County Board may also impose an Assessment for the Year for the Purpose of defraying the Expenses of building, altering, or repairing any Local Prison within the County, or of acquiring Lands for such Purpose; and such Assessment shall be called the Building Assessment: Provided that no such Building Assessment shall exceed the Amount which, as set forth in the Twenty-first Annual Report of the General Board of Directors of Prisons, presented to both Houses of Parliament, was or might legally have been estimated for as a Building Fund before the Commencement of this Act for such County, unless the same shall in Terms of any Agreement or Minute to that Effect laid before the County Board be consented to by the Commissioners of Supply of such County on behalf of the Landward Part thereof, and by the Town Councils of Burghs situated therein entitled to choose Members of the County Prison Board on behalf of their respective Burghs, and it shall appear that the Persons on whose behalf such Consent has been given shall have contributed or been liable to contribute not less than Three Fourths of the Assessments imposed on such County and the Burghs situated therein.

Clerk of  
the Peace  
to appor-  
tion the  
total  
Amount of  
Assessment  
between  
the Land-  
ward Part  
of County  
and the  
Burghs  
therein.

XXXIV. When any Assessment has been imposed by a County Board, the Clerk of the Board shall forthwith divide and apportion the total Amount thereof between the Landward Part of the County and the Burghs situated therein, according to the total Value of Lands and Heritages on which the immediately preceding Assessment for Prison Purposes was levied or leviable in such Landward Part and in each such Burgh; and within Eight Days after such Assessment has been imposed he shall transmit to the Conveners of the Commissioners of Supply of the County, and to the Chief Magistrate of each Burgh situated therein, a Notification of the total Amount imposed, and of the Pro-

portion of such total Amount to be paid by the Landward Part and by each Burgh respectively, to the County Board.

XXXV. If a Building Assessment for any Year appear to be necessary for any County, and the County Board shall fail to impose the same previous to the First Day of *October*, it shall be lawful for the Court of Session, or either Division thereof, on a Summary Petition presented at the Instance of the Lord Advocate or of any Member of the County Board, to give such Directions and Orders to the County Board in regard to the imposing or levying of a Building Assessment as to them may seem fit.

XXXVI. Every Assessment under this Act shall be levied upon the Lands and Heritages within the County for which it is imposed, and the Burghs situated therein, according to the yearly Value of such Lands and Heritages as established by the Valuation Rolls in Force for the Year of Assessment under an Act passed in the Seventeenth and Eighteenth Year of the Reign of Her present Majesty, intituled *An Act for the Valuation of Lands and Heritages* in Scotland, and an Act passed in the Twentieth and Twenty-first Year of the Reign of Her present Majesty, intituled *An Act to amend the Act Seventeenth and Eighteenth of Victoria, for the Valuation of Lands in Scotland*, or either of the said Acts.

XXXVII. Every Assessment under this Act shall be payable for the Period from *Whitsunday* of the Year in which the same is imposed to the ensuing Term of *Whitsunday*: Provided that if there shall be any Deficiency in the Funds available during any Year for current Expenses, the same may be made good in imposing any subsequent Assessment; and if there be any Surplus of Funds for current Expenses at the Term of *Whitsunday*, the same may be applied to the current Expenses of the ensuing Year.

XXXVIII. The Persons charged with the levying and collecting of the Assessments as herein-after provided shall remit the same to the County Board free of all Expense and at the Risk of the Remitters; and any Portion of an Assessment which shall not be so remitted within Eight Months from the Date of the Notification shall bear Interest from and after such Term.

XXXIX. The Commissioners of Supply of each County are hereby charged with the levying and collecting of all Assessments under this Act, in so far as the same are leviable on Lands and Heritages in the Landward Part of the County; and the said Commissioners are hereby authorized and required, as soon as conveniently may be after Notice as aforesaid to the Convener of the County, to assess and levy and collect, or direct the levying and collecting of the

same, together with such further Sum as may be necessary to cover Expenses of Assessment, Collection, and Remittance, and any Arrears, with Interest thereon, of preceding Years, and any Deficiency on account of Exemption from Assessment; and the said Commissioners shall proceed in such Manner, and by means of such Collectors or other Persons as they shall from Time to Time appoint.

Assess-  
ments may  
be levied  
on Pro-  
prietor or  
Tenant,  
and when  
of small  
Amount  
may be  
postponed  
for Two  
or more  
Years.

**XL.** Assessments on Lands and Heritages in the Landward Parts of Counties may be levied either on the Proprietor or the Tenant; but the Tenant, in case of his paying such Assessment, shall be entitled to deduct the Amount thereof from the Rent payable by him: Provided always, that where such Assessment on Houses shall be of small Amount, it shall be competent to the said Commissioners to postpone the Collection of the same, to the Effect of collecting Two or more Years Assessment on Houses at One Time, as they may think proper: Provided also, that it shall be lawful to exempt from the annual Assessment to be levied on Lands and Heritages in the Landward Part of any County any Property the annual Value of which shall not exceed Two Pounds Sterling, on account of the Poverty of the Owner thereof.

Magis-  
trates to  
levy As-  
sessments  
in Burghs.

**XLI.** The Magistrates of each Burgh are hereby charged with the levying and collecting of all Assessments under this Act, in so far as the same are leviable on Lands and Heritages within their respective Burghs; and the Magistrates of each Burgh are hereby authorized and required, as soon as conveniently may be after Notice as aforesaid by the County Board to the Chief Magistrate, to levy and collect, or direct the levying and collecting of the same, together with such further Sum as may be necessary to cover Expenses of Assessment, Collection, and Remittance, and any Arrears, with Interest thereon, of preceding Years, and any Deficiency on account of Exemption from Assessment; and they may proceed in like Manner and with the same Powers and Right of Action and Diligence, and of using Summary Warrants and Proceedings for the Recovery of the same, as may be competent with respect to any Municipal or Police or general Assessment with which the said Magistrates may deem it most expedient that the Sum apportioned as aforesaid should be laid on and collected: and any Board or other Public Body which may be directed by the Magistrates of any Burgh to levy and collect the said Assessment are hereby empowered and required to do so: Provided that in any Burgh or Part thereof in which there may be no Municipal or Police or other general Assessment, or in any Burgh in which it may appear to the Magistrates to be inexpedient to levy the Assessment hereby authorized



along with any other existing Assessment, they shall collect the same in such Manner, and by means of such Collectors or other Persons as they shall from Time to Time appoint.

XLII. Provided always, That in any Burgh in which the free yearly Proceeds of the Common Good Property and Revenues thereof may be judged by the Magistrates thereof to be sufficient to pay the Sum or any Part thereof, annually apportioned on such Burgh as aforesaid, after defraying the ordinary Municipal and Police Charges and Expenses and other annual Burdens chargeable on such Common Good Property or Revenues, including the Interest of Debts due by such Burgh, it shall be competent to the Magistrates thereof to pay so much of the Sum so apportioned on such Burgh as is due by that Part of the Burgh entitled to such Common Good Property and Revenues.

XLIII. Assessments within Burghs shall be payable by the Tenant or Occupier of the Lands and Heritages assessed; but the Tenant or Occupier by whom such Assessment shall be paid shall be entitled to deduct One Half of such Assessment from the Rent payable to the Proprietor or Person by whom such Property was let: Provided always, that One Half of such Assessment may be levied directly from the Proprietor of Lands and Heritages assessed within the Burgh: Provided also, that where the Rent is under Five Pounds the Magistrates of any Burgh may remit, on account of Poverty, the whole or any Part of the Assessment authorized by this Act to be levied from any Tenant or Occupier of Lands and Heritages within Burgh.

XLIV. The whole Powers and Right of issuing Summary Warrant and Proceedings, and all Remedies and Provisions enacted for collecting, levying, and recovering the Land and Assessed Taxes, or any of them, and other Public Taxes, shall be applicable to the collecting, levying, and recovering the Assessments under this Act; and all Sheriffs, Magistrates, Justices of the Peace, and other Judges may grant the like Warrants for Recovery of all such Assessments in the same Form and under the same Penalties as is provided in regard to such Land and Assessed Taxes and other Public Taxes; and all Assessments imposed in virtue of this Act shall, in the Case of Bankruptcy or Insolvency, be paid out of the First Proceeds of the Estate, and shall be preferable to all other Debts of a private Nature due by the Persons assessed; and Interest may be charged on any Assessment, and Proceedings taken for the Recovery thereof, on any Day either before or after the said ensuing Term of *Whitsunday*, provided that if such Day be before the Term, a Notice of the Amount payable shall have been delivered



to or left at the Dwelling House or Place of Business of the Person liable in Payment Two Calendar Months before such Day.

Boundaries of Burghs for Purposes of this Act shall be as fixed by 17 & 18 Vict., c. 91, 20 & 21 Vict., c. 58, and 20 & 21 Vict., c. 70.

XLV. The Boundaries of Burghs for the Purposes of this Act shall be the Boundaries thereof as the same are ascertained and fixed under the Provisions to that Effect contained in the following Acts; viz., (1) an Act passed in the Seventeenth and Eighteenth Year of the Reign of Her present Majesty, intituled *An Act for the Valuation of Lands and Heritages in Scotland*; (2) an Act passed in the Twentieth and Twenty-first Year of the Reign of Her present Majesty, intituled *An Act to amend the Act Seventeenth and Eighteenth of Victoria, for the Valuation of Lands in Scotland*; (3) an Act passed in the Twentieth and Twenty-first Year of the Reign of Her present Majesty, intituled *An Act to provide for the Extension of the Boundaries of Burghs in Scotland, and to remove Doubts as to the Right of certain Persons holding Offices to be registered as Voters for Municipal Purposes*.

Disputes arising as to Assessment may be summarily settled by the Sheriff.

XLVI. Any Dispute which may arise in adjusting the Boundaries of any Burgh, and any Dispute which may arise in imposing or levying the Assessments authorized by this Act between the Commissioners of Supply of Counties or the Magistrates of Burghs, or the Assessors, Collectors, or others acting under them, on the one Part, and any Person aggrieved on the other Part, for the Settlement of which Dispute no Provision shall be made under the Authority of this Act, and in case it shall not be convenient to raise and determine the same in the Sheriff's Small Debt Court, shall be determined in a summary Manner by the Sheriff of the County in which such Dispute shall arise, who shall on a written Petition being presented to him by the Procurator Fiscal, or by any of the aforesaid Parties, appoint the Parties to appear before him, when he shall hear them, investigate the Matter in Dispute in such Manner as he may think proper, and decide the same summarily; and the Decision of such Sheriff shall be final, and shall not be liable to Appeal or to Suspension, Advocation, or Reduction, or any other Form of Review.

Accounts to be published.

XLVII. The County Board of each County shall before the End of every financial Year publish detailed Accounts of their Receipts and Expenditure under and for the Purposes of this Act, which Accounts shall be printed, and a Copy thereof shall be furnished to the Commissioners of Supply of the County and to the Town Council of every Burgh situated therein.

Counties may unite

XLVIII. For the Purpose of erecting and maintaining Local Prisons, and paying the Expenses thereof, the Com-

missioners of Supply of Two or more Counties, and the Town Councils of the Burghs situated therein, shall have Power to form a Union of their respective Counties in manner following: The Proportion in which each County is to contribute to the Expense of such Prison, the Method of Management thereof, which may be by a Committee jointly appointed by the County Boards interested, and all other necessary Particulars, shall be set forth in a Minute or Agreement certified under the Hand of the Sheriff or Sheriffs of the respective Counties, and such Minute or Agreement on being published in the *Edinburgh Gazette* and in Two Newspapers circulated in the Counties so united, shall be binding on all Persons as if the same were Part of this Act; and when any such Union shall be formed, and when an Order under the Hand of One of Her Majesty's Principal Secretaries of State, fixing the Classes of Prisoners for which such Prisons shall be legal, shall take Effect as herein provided, it shall be lawful for the Sheriffs and other Magistrates of the Counties forming the Union to exercise the same Jurisdiction with respect to such common Prison, and the Removal of Prisoners to and from the same, as if it were locally situated within their respective Counties, and the Provisions of this Act shall apply to the Removal of Prisoners to and from such Prison, as if the Counties so united were One County: Provided that the Prison of *Fort William* shall continue to be, to the Purport and Intent to which the same shall at the Commencement of this Act be, a Prison for the Use of the Counties of *Argyle* and *Inverness* respectively.

XLIX. Whereas Arrears of Assessment for Prison Purposes have long been due by the Landward Part of the County of *Orkney*, and it is doubtful whether any considerable Portion thereof could now be recovered from the Parties originally liable therefor, or their Representatives: It shall be lawful for the Commissioners of Supply of the said County, along with any Assessment to be imposed and levied by them under the Authority of this Act, to impose, levy, and collect on and from the Proprietors and Tenants of Lands and Heritages in the Landward Part of the said County, such additional Sum as they shall think fit towards Payment of such Arrears; and such additional Sum shall be apportioned on the Lands and Heritages in such Landward Part in the same Manner as the Assessments authorized by this Act; and all the Provisions of this Act applicable to Assessments and the Recovery of the Sums assessed shall be applicable to such additional Sum.

L. The Commissioners of Supply for the Counties of *Ross* and *Cromarty*, and also for that Portion of the County

for erect-  
ing and  
maintain-  
ing Local  
Prisons.

As to Ar-  
rears of  
Assesse-  
ment in  
*Orkney*.

Special  
Local Ar-

arrangements of *Nairn* which is locally situated in the County of *Ross*, shall meet together for the Purposes of this Act at the usual Place of Meeting of the Commissioners of Supply of the County of *Ross*, and shall exercise the Powers conferred by this Act on Commissioners of Supply with respect to the said Counties of *Ross* and *Cromarty* and the said Portion of the County of *Nairn*.

#### REFORMATORIES.

County  
Boards  
may con-  
tribute to  
Reforma-  
tories.

LI. A County Board may, with the Consent of the Commissioners of Supply of such County, resolve to contribute to any Reformatory in any Part of *Scotland* which has been certified by One of Her Majesty's Principal Secretaries of State, in Terms of an Act passed in the Seventeenth and Eighteenth Year of Her present Majesty, intituled *An Act for the better Care and Reformation of Youthful Offenders in Great Britain*, and on such Resolution, stating the Name of the Reformatory to which they propose to contribute, being transmitted to the Secretary of State for the Home Department, being One of Her Majesty's Principal Secretaries of State, he shall intimate whether he approves or disapproves of such Resolution, and if he intimate that he approves thereof, such County Board may from Time to Time pay over such Sum as they may think fit to the Directors and Managers of such Reformatory, and such Sum shall be a Charge on the Assessment for current Expenses: Provided, that if at any Time such Secretary of State shall notify his Withdrawal of such his Approval, it shall no longer be lawful for the County Board to contribute to such Reformatory.

#### MANAGERS OF THE GENERAL PRISON.

Appoint-  
ment of  
Managers  
of the  
General  
Prison at  
Perth.

5 & 6 W.  
4, c. 88.

LII. The following Persons shall be and are hereby appointed Managers of the General Prison at *Perth*, any Two of whom shall be a Quorum; viz., the Sheriff Principal of the County of *Perth*, the Inspector of Prisons for *Scotland* appointed under an Act passed in the Fifth and Sixth Year of the Reign of His late Majesty King *William* the Fourth, intituled *An Act for effecting greater Uniformity of Practice in the Government of the several Prisons in England and Wales, and for appointing Inspectors of Prisons in Great Britain*, the Crown Agent in *Scotland* for the Time being, and One Person who shall be appointed and may be removed by Her Majesty, and shall receive such Salary as shall be fixed by the Commissioners of Her Majesty's Treasury, not exceeding Seven hundred Pounds a Year: and such last-mentioned Person shall also discharge all the Duties of Secretary to the Managers; and, except as herein

provided, the Managers shall not derive any Profit or Emolument for the Performance of any Duties under this Act, nor shall they be personally responsible for anything done *bonâ fide* in the Execution of this Act, or in the exercise of the Powers herein contained.

LIII. The Managers shall have such Office Accommodation, and such Assistance of Clerks, Office Keepers, or Messengers, as One of Her Majesty's Principal Secretaries of State may from Time to Time direct. Office Accommodation of Managers.

LIV. The Managers shall defray the Expenses incurred in the Performance of the various Duties and Functions hereby committed to them out of such Moneys as may be voted by Parliament for such Purposes respectively, and shall render their Accounts for such Expenditure to the Commissioners of Audit, in such Manner and at such Periods as the Commissioners of Her Majesty's Treasury may direct. Expenses of Managers to be paid out of Moneys voted by Parliament.

LV. From and after the Commencement of this Act the General Prison at Perth as at the said Date belonging to and vested in the General Board of Directors of Prisons, and all Rights of Property, Action, or Recovery relative thereto, and all other Lands and Heritages at the said Date belonging to and vested in the said General Board, shall be and are hereby transferred to and vested in the Commissioners of Her Majesty's Works and Public Buildings, for the Purposes and subject to the Provisions of this Act: General Prison at Perth, and Rights, &c. belonging thereto, vested in the Commissioners of Works and Public Buildings. Provided that it shall be lawful for the Managers to sue for, recover, and discharge all Debts or Sums of Money due to the said General Board at the Commencement of this Act, and to receive from the said General Board all Moveable Property, Records, and Documents belonging thereto, and to hold and dispose of the same for the Purposes and subject to the Provisions of this Act and to any Directions to be given relative thereto by One of Her Majesty's Principal Secretaries of State.

LVI. It shall be the Duty of the Managers, and they are hereby authorized and empowered to bring to Completion all Matters and Proceedings left by the General Board of Directors of Prisons uncompleted at the Commencement of this Act; and they shall receive from the said General Board, and remit to the several County Boards any Balances of Moneys raised within such Counties by Assessment in the Possession of, or at the Order, or under the Control of the said General Board at the Commencement of this Act. Managers to complete Matters left unfinished by General Board, and transmit Balances of Assessments to County Boards.

LVII. Whereas it is expedient that the Statistics regarding Prisons and Prisoners in Scotland should continue, as heretofore, to be collected and digested, and laid before Parliament in a tabular Form: The Clerks of the several Provision for collecting, arranging,

and re-  
porting  
Prison  
Statistics.

County Boards shall and they are hereby required to transmit to the Managers such Returns as one of Her Majesty's Principal Secretaries of State shall from Time to Time direct, applicable to the Amount of Prison Accommodation in the County, the Number of Prisoners, their Ages, Sentences, Educational Condition, Health, Conduct, Casualties, Prison Punishments, the Receipts and Expenditure connected with the several Prisons, the Observance of the Rules, and other similar Matters.

Provision  
for Inquir-  
ies into  
Condition  
and Man-  
agement  
of Prisons.

LVIII. The Managers, or any One or more of them, may, with the Authority in Writing of such Secretary of State, proceed to any Prison and inquire into the Condition and Management thereof, and may require Access to all Documents therein or in reference thereto, and may require the Attendance of any Witness, by Service by any Sheriff-Officer or Constable of a written Intimation to such Witness personally or at his usual Place of Residence, and may examine such Witness on Oath; and any Person interrupting such Inquiry, or failing, when required, to produce any Document, or to attend or give Evidence, shall, on summary Complaint and Conviction before the Sheriff, be liable to a Penalty not exceeding Ten Pounds, or to be imprisoned for any Period not exceeding Thirty Days.

Return of  
Sentences  
of Imprisonment  
to be made  
to Man-  
agers as in  
Sched. (B.)

LIX. When any Criminal shall have been sentenced, the Clerk of the High Court of Justiciary, if such Sentence shall have been pronounced by the said High Court, or the Clerk of the Circuit Court of Justiciary, if such Sentence shall have been pronounced by the Circuit Court of Justiciary, or the Sheriff Clerk of the County, if such Sentence shall have been pronounced by the Sheriff, shall within Eight Days after such Sentence shall have been pronounced make a Return thereof to the Managers, which Return shall be in the Form of the Schedule (B.) hereunto annexed.

Annual  
Report to  
be made  
to Secre-  
tary of  
State by  
Managers.

LX. The Managers shall, on or before the Fifteenth Day of *February* in every Year, make and transmit to One of Her Majesty's Principal Secretaries of State a full Report of their whole Proceedings during the Year ending on the Thirty-first Day of *December* preceding, and an Abstract of their whole Receipts and Expenditure, classifying the separate Articles thereof; and in the said Report, or in the Appendix thereto, there shall be set forth all new Rules or Alterations of Rules for Prisons which shall have been made by such Secretary of State as aforesaid, any Orders issued by such Secretary of State constituting a new Prison or altering the Classes of Prisoners for which a Prison is legal, and such Information and Statistics regarding Prisons in *Scotland* as such Secretary of State may require; and a Copy of every such Report shall be laid before both Houses

of Parliament within Fourteen Days after the Fifteenth Day of *February*, if then assembled, or if Parliament shall not be then assembled within Fourteen Days after the next Meeting thereof.

#### GENERAL PRISON AND CUSTODY OF CONVICTS.

LXI. The Managers, subject to the Provisions of this <sup>Managers subject to</sup> Act, and the Rules in force in Terms thereof, and also sub- <sup>Instruc-</sup>ject to such Instructions as they may from Time to Time <sup>tions of</sup> receive from One of Her Majesty's Principal Secretaries of <sup>Secretary</sup> State, shall have the Administration and Government of the <sup>of State,</sup> General Prison at *Perth*, and shall from Time to Time visit <sup>to have the</sup> the said Prison : Provided that One or more of the Mana- <sup>Adminis-</sup>gers shall once at least in every Month see and communicate <sup>tration of</sup> with each Prisoner, shall examine the Books, Accounts, and <sup>the Gene-</sup> Documents kept in the Prison, shall inspect the Prison <sup>ral Prison-</sup> Premises and Stores, shall examine into the Conduct of the several Officers, shall investigate all Complaints and alleged or apparent Abuses, or Deviations from the Rules, shall inquire into the Cause and Nature of every Punishment that has been administered, shall ascertain how far the Health, Education, and Industrial Training of the Prisoners are in a satisfactory Condition, and shall make a Report in Writing, under these Heads, which shall be laid before and specially considered by the Managers and Visitors.

LXII. Besides such Rules for the Government of the <sup>Rules to be</sup> General Prison, and for the Custody, Discipline, and <sup>made for</sup> Dietaries of the several Classes of Prisoners therein, as may <sup>the Staff</sup> exist at the Commencement of this Act, or may thereafter <sup>of the</sup> be adopted, Provision shall be made by further Rules for <sup>General</sup> the Method in which the Establishment of Officers in the <sup>Prison.</sup> said Prison shall from Time to Time be adjusted, and for the Appointment and Dismissal of such Officers, and the fixing of their Salaries ; and until such Rules come into force no Appointment or Dismissal of an Officer, and no Alteration of an Officer's Salary in the said Prison, shall take Effect unless the same be approved by One of Her Majesty's Principal Secretaries of State.

LXIII. The General Prison at *Perth* shall be a Prison <sup>Classes of</sup> for the Reception and Detention of Prisoners sentenced to <sup>Prisoners</sup> Imprisonment by the Courts of Law in *Scotland*, and also <sup>to be con-</sup> for the Reception and Detention of such Convicts under <sup>finned in</sup> Sentence or Order of Transportation or of Penal Servitude, <sup>the Gene-</sup> as Her Majesty may please to direct to be removed to such <sup>ral Prison.</sup> General Prison under the Powers contained in an Act of the Tenth and Eleventh Year of the Reign of Her present <sup>10 & 11</sup> Majesty, intituled *An Act to amend the Law as to the Custody* <sup>Vict., c. 67.</sup>

of *Offenders*; and of an Act of the Sixteenth and Seventeenth Year of the Reign of Her present Majesty, intituled  
 16 & 17 *An Act to substitute in certain Cases other Punishments in*  
 Vict., c. 99. *lieu of Transportation*; and of an Act of the Twentieth and  
 Twenty-first Year of the Reign of Her present Majesty,  
 20 & 21 *An Act to amend the Act of the Sixteenth and*  
 Vict., c. 3. *Seventeenth Years of Her Majesty, to substitute in certain*  
*Cases other Punishments in lieu of Transportation.*

Sentences  
 of Nine  
 Months  
 and up-  
 wards to  
 be carried  
 out in the  
 General  
 Prison.

LXIV. From and after the Commencement of this Act, when a Sentence is pronounced by any Court of competent Jurisdiction adjudging any Person to Imprisonment for a Period of Nine Months or upwards, such Sentence, whether the General Prison at *Perth* be mentioned therein or not, or whether the Name of any other Prison be mentioned therein or not, shall be deemed to be and is hereby declared to be a Sentence which may be carried into effect in the said General Prison, unless such Sentence contains a Clause especially declaring that the Prisoner shall not be removed to such General Prison; and any Person undergoing a Sentence which may be so carried into Effect in the General Prison may be removed thereto at any time in Terms of the Provisions of this Act for the Removal of Prisoners; and if such Sentence adjudge the Prisoner to Hard Labour for any Period, Effect shall be given to such Adjudgment in the General Prison, so far as the same has not been carried into Effect in a Local Prison.

Provisions  
 for the  
 Adminis-  
 tration of  
 Convict  
 Establish-  
 ments ap-  
 pointed  
 under ex-  
 isting  
 Statutes.

LXV. Whereas by an Act of the Fifth Year of the Reign of His Majesty King *George* the Fourth, intituled *An Act for the Transportation of Offenders from Great Britain*, Her Majesty is empowered to appoint Places of Confinement within *England* and *Wales* for Male Convicts under Sentence or Order of Transportation; and by the herein-before recited Act of the Twentieth and Twenty-first Year of the Reign of Her present Majesty, to substitute in certain Cases other Punishments in lieu of Transportation, it is provided that the Power to appoint such Places of Confinement, and other Provisions of the foresaid Act, shall extend and be applicable to and for the Appointment by Her Majesty of like Places of Confinement in any Part of the United Kingdom for Offenders, whether Male or Female, sentenced under the Provisions of such last-mentioned Act: If at any time Her Majesty shall be pleased to appoint such Place of Confinement in *Scotland*, the same shall be a lawful Place of Confinement for such Offenders, whether Male or Female, under Sentence or Order of Transportation or Penal Servitude, as Her Majesty, under the Powers of the herein-before recited Act to that Effect, may be pleased to direct to be removed thereto; and all the Provisions of the ~~before-recited~~

Acts relating to such Places of Confinement, and to the Persons confined therein, shall be in force in any Place so appointed in *Scotland*, so far as the same shall be applicable thereto and are not superseded by the Provisions of this Act; and such Place of Confinement shall be deemed a Prison for the Purposes of this Act, and all the Provisions herein contained relative to the General Prison, so far as the same are applicable to Persons under Sentence or Order of Transportation or of Penal Servitude, shall apply to such Place of Confinement.

#### REMOVALS OF PRISONERS.

LXVI. When, by the Order, Declaration, or other Proceeding by which a Prison is rendered legal, certain Prisoners other than the Class for which it is legal are appointed to be removed to another Prison within the same County, such Removal, as well as all Removals of Prisoners from one Local Prison to another within the same County, shall be carried out by or under the Direction of the County Board; and all Persons employed in such Removals shall obey the Instructions received by them from the County Board, so far as the same are consistent with the Provisions of this Act; and the Expense of such Removals shall be a Charge on the Assessment for current Expenses.

LXVII. Save as herein excepted, all Removals of Prisoners from one Prison in *Scotland* to another Prison in *Scotland*, and all Removals of Convicts sentenced to Transportation or to Penal Servitude from any Prison in *Scotland* to any One of Her Majesty's Prisons or Penitentiaries in *England*, in virtue of Warrants granted by One of Her Majesty's Principal Secretaries of State under the Provisions of the Statutes to that Effect, shall be carried out by or under the Direction of the Managers, who may issue Regulations or Instructions for carrying out such Removals, and fix from Time to Time the Remuneration and Allowances to be paid to the Persons employed therein; and such Regulations and Instructions shall, so far as the same are not inconsistent with the existing Laws or Statutes, be binding on the Persons to whom any such Warrants by Order of Her Majesty's Principal Secretaries of State are addressed, and all other Persons employed in carrying into Effect such Removals of Prisoners.

LXVIII. It shall be lawful, in virtue of an Order under the Hand of One of Her Majesty's Principal Secretaries of State, to remove any Prisoner from any Prison in *Scotland* to any other Prison in *Scotland*, being a legal Prison for the



Class of Prisoners to which such Prisoner belongs, and the Sentence or Warrant under which he is committed shall be as effectual in the Prison to which he is so removed as in the Prison named therein.

Prisoners removed to General Prison may be taken back to Local Prison.

LXIX. Any Prisoner sentenced to a Period of Imprisonment who has been removed from a Local Prison to the General Prison may, at any Time before the Expiry of his Sentence, be removed back to the Local Prison whence he was brought, under the Provisions of this Act relating to the Removal of Prisoners.

Not to interfere with Removal by Court of Law.

LXX. Nothing in this Act contained relating to the Removal of Prisoners shall affect the Power possessed by any Court of Law to direct the Removal of any Prisoner to be carried out by any Officer of such Court or other Officer of the Law.

#### MISCELLANEOUS.

Persons who are entitled to visit Prisons.

LXXI. The following Persons shall be entitled to visit the several Prisons in *Scotland*; namely, Her Majesty's Principal Secretaries of State, or any Persons appointed by them or any of them, the Lords Lieutenant of Counties in *Scotland*, the Members of Her Majesty's Privy Council, the Judges of the Court of Session, the Lord Advocate and Solicitor-General of *Scotland*, and the Managers appointed by or under the Authority of this Act: The following Persons shall also be entitled to visit the Local Prisons within their respective Counties and Burghs, namely, Sheriffs, Conveners of Commissioners of Supply, Members of County Prison Boards, Justices of the Peace, and Magistrates of Burghs; and any Person visiting a Prison which he is hereby empowered to visit shall have Access, if he desire it, to every Prisoner confined therein, or otherwise to such Prisoners as he may desire to see, and may report his Observations on the Discipline and Management of such Prison to the Administrators thereof, or to One of Her Majesty's Principal Secretaries of State: Provided that in any Rules for Prisons adopted under this Act Provision may be made for authorizing other Persons to visit any Prisons under such Restrictions as the Rules may contain; and that the Administrators of any Prison may by an Order in Writing grant special Permission to any Person to visit the same.

Removal of Prisoners diseased or in danger of Life to Hospitals, &c.

LXXII. When in reference to any Person confined in a Prison it is certified by Two Medical Practitioners who have visited and carefully examined him, that he is afflicted with any contagious or infectious Disease which renders his Removal necessary for the Health of the other Inmates of the

Prison, or that he is afflicted with any Disease which threatens immediate Danger to Life and cannot be treated in Prison, or that from his condition continued Confinement would cause his Death, it shall be lawful for the Sheriff, on summary Application at the Instance of the Administrators of the Prison, accompanied by such Certificate, to order the Prisoner to be removed to an Hospital or other fit Place, under such Precautions as to the Sheriff may seem necessary and proper.

LXXIII. When any Sentence awarded by any Court of competent Jurisdiction for any Crime or Offence is a Sentence to a Period of Imprisonment, to be accompanied, during either the whole or a Portion of such Period, with Hard Labour, such Hard Labour shall be exacted and performed in the Manner set forth in the Rules applicable to the Prison for the Time being under this Act; and in any Rules which may be hereafter made in Terms of this Act, it shall be competent to include Rules for carrying out Sentences of Hard Labour.

LXXIV. In every Case where it is competent for any Judge or Magistrate to award Sentence of Imprisonment, or a Fine with the Alternative of Imprisonment, it shall be lawful for such Judge or Magistrate, in the Case of any Juvenile Offender, being a Male, whose Age in the Opinion of such Judge or Magistrate shall not exceed Fourteen Years, to adjudge such Offender, instead of Imprisonment or of Imprisonment and Hard Labour, or in addition to Imprisonment or Imprisonment and Hard Labour, to be punished by private Whipping, in such Manner and according to such Regulations as have been or shall be made by the Lord Advocate of *Scotland* in that behalf, and approved by One of Her Majesty's Principal Secretaries of State.

LXXV. If any Person shall carry or bring, or attempt or endeavour, by throwing over the Walls or by any other Means, to introduce, into any Prison in *Scotland* any Letters, Tobacco, Spirits, or other Articles not allowed by the Rules of such Prison, it shall be lawful for any Person to apprehend such Offender, and to carry him before the Sheriff, or any Two Justices of the Peace of the County, or any Magistrate of a Burgh in which such Prison is situated, who are hereby empowered to hear and determine such Offence in a summary Way; and if the Person complained of shall be lawfully convicted of such Offence, the Sheriff, Justices, or Magistrate shall forthwith sentence such Offender to Imprisonment, with or without Hard Labour, for any Period not exceeding One Month, unless such Offender shall immediately pay such Penalty, not exceeding Five Pounds nor less than Forty Shillings, as such Sheriff,

Justices, or Magistrate shall impose; and such Penalty shall be applied towards the Expense of such Prosecution, and the Surplus, if any, towards the Maintenance of such Prison.

Laws as to Aliment and Liberation, and Responsibility for safe Custody continued.

LXXXVI. The Sheriff shall continue to exercise the Powers and Jurisdiction at present possessed by him with respect to Applications and Proceedings for Aliment and for Liberation of Civil Prisoners, and nothing herein contained shall be held to alter the Law with respect to the Aliment of Prisoners, or Responsibility for the safe Custody of Prisoners.

8 & 9 Vict., c. 19, incorporated with this Act for Acquisition of Lands.

LXXXVII. For enabling the said Commissioners of Her Majesty's Works and Public Buildings, and any County Board to purchase, take, and acquire Lands for the Purposes of this Act, "The Lands Clauses Consolidation (*Scotland*) Act, 1845," shall be incorporated with and form Part of this Act: Provided that the Clauses of the said Lands Clauses Consolidation Act with respect to the Purchase and taking of Lands otherwise than by Agreement shall not be incorporated herewith, except for the Purpose of acquiring Lands adjoining to a Prison for the Purpose of enlarging such Prison; and the Expression "the Special Act" in the said Lands Clauses Consolidation Act shall mean this Act; and the Expression "the Promoters of the Undertaking" in the said Act shall mean and include the said Commissioners of Her Majesty's Works and Public Buildings, and any County Board seeking to acquire Lands under this Act.

## SCHEDULES referred to in the foregoing Act.

## SCHEDULE (A.)

TABLE of COUNTY PRISON BOARDS, containing the Number of Members to be appointed for the Landward Part of each County by the Commissioners of Supply thereof; for the Burghs situated in each County by the Magistrates thereof.

COUNTY.	Landward Part of County and Burghs.	N <sup>o</sup> . of Members to be appointed.	COUNTY.	Landward Part of County and Burghs.	N <sup>o</sup> . of Members to be appointed.
1.	2.	3.	1.	2.	3.
1. Aberdeen .	Landward Part Aberdeen . . Peterhead . .	15 7 1	9. Dumbarton	Landward Part Dumbarton . .	7 1
		23			8
2. Argyle . .	Landward Part Campbeltown .	11 1	10. Dumfries .	Landward Part Dumfries . . .	14 2
		12			16
3. Ayr . . . .	Landward Part Ayr . . . . . Irvine . . . . . Kilmarnock . .	15 1 1 2	11. Edinburgh .	Landward Part Edinburgh . . . Leith . . . . . Musselburgh . . Portobello . . .	6 9 2 1 1
		19			19
4. Banff . . .	Landward Part Banff . . . . .	7 1	12. Elgin . . .	Landward Part Elgin . . . . .	7 1
		8			8
5. Berwick . .	Landward Part	9			
6. Bute . . . .	Landward Part Rothsay . . . .	4 3	13. Fife . . . .	Landward Part Cupar . . . . . Dunfermline . . Dysart . . . . . Kirkcaldy . . . St Andrews . . .	13 1 2 1 1 1
		7			19
7. Caithness .	Landward Part	7			
8. Clackmannan	Landward Part	6			

COUNTY.	Landward Part of County and Burghs.	No. of Members to be appointed.	COUNTY.	Landward Part of County and Burghs.	No. of Members to be appointed.
1.	2.	3.	1.	2.	3.
14. Forfar . .	Landward Part Arbroath . . . Brechin . . . Dundee . . . Forfar . . . Montrose . . .	10 2 1 6 1 2	23. Orkney . .	Landward Part	7
		22	24. Peebles . .	Landward Part Peebles . . .	6 1
15. Haddington .	Landward Part Dunbar . . . Haddington . .	8 1 1			7
		10	25. Perth . .	Landward Part Perth . . . .	16 3
16. Inverness .	Landward Part Inverness . . .	13 2	26. Renfrew . .	Landward Part Greenock . . . Paisley . . . Port-Glasgow . Renfrew . . .	10 5 5 1 1
		15			22
17. Kincardine .	Landward Part	6	27. Ross and } Cromarty }	Landward Part	15
18. Kinross . .	Landward Part	6	28. Roxburgh .	Landward Part Jedburgh . . .	11 1
19. Kirkcudbright	Landward Part	8			12
20. Lanark . .	Landward Part Airdrie . . . Glasgow . . . Hamilton . . . Lanark . . . Rutherglen . .	10 1 14 1 1 1	29. Selkirk . .	Landward Part Selkirk . . .	4 2
		28			6
21. Linlithgow .	Landward Part Linlithgow . .	6 1	30. Stirling . .	Landward Part Stirling . . . Falkirk . . .	9 2 1
		7			12
22. Nairn . . .	Landward Part Nairn . . . . .	5 2	31. Sutherland .	Landward Part	6
		7	32. Wigtown . .	Landward Part Stranraer . .	12 2
		7			14
			33. Zetland . .	Landward Part	8

## SCHEDULE (B.)

Name.	Sex.	Age.	Occupation.	Married or Unmarried.	Offence.	County where Offence committed.	Date of Offence.	Number of previous Convictions, and from what Courts.	Sentence. *	Date of Sentence.

\* The Period for which the Prisoner is sentenced to be imprisoned, and the Prison in which he is sentenced to be confined, are to be inserted under this Head.

## CAP. CVL

*An Act to amend the Lands Clauses Consolidation Acts (1845) in regard to Sales and Compensation for Land by way of a Rentcharge, Annual Feu Duty or Ground Annual, and to enable Her Majesty's Principal Secretary of State for the War Department to avail himself of the Powers and Provisions contained in the same Acts.—[20th August 1860.]*

WHEREAS it is expedient to extend the Provisions of the Lands Clauses Consolidation Acts, 1845, in regard to Sales <sup>8 & 9 Vict.,</sup> of Land, or Compensation for Damages, in consideration <sup>c. 18.</sup> of an annual Rentcharge, Annual Feu Duty or Ground Annual, and to enable Her Majesty's Principal Secretary of State for the War Department to avail himself of the Powers and Provisions contained in the same Act for the

Purchase of Lands wanted for the Service of the War Department or for the Defence of the Realm: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Part of  
Sect. 10 of  
recited  
Act  
repealed.

I. So much of the Tenth Section of the Lands Clauses Consolidation Act, 1845, as provides that, save in the Case of Lands of which any Person is seised in fee or entitled to dispose absolutely for their own Benefit, the Consideration to be paid for any Lands, or for any Damage done thereto, shall be in a gross Sum, is hereby repealed.

Sects. 10  
and 11 of  
recited  
Act, as to  
Power to  
sell, &c.  
Lands for  
an annual  
Rent-  
charge,  
and to re-  
cover, ex-  
tended to  
all Sales,  
&c. where  
Parties are  
under Dis-  
ability.  
Similar  
Proviso  
with re-  
gard to  
Lands sold  
under  
Sect. 10 of  
8 & 9  
Vict., c. 19.

II. The Power to sell and convey Lands in consideration of an annual Rentcharge provided by the Tenth Section of the said Act, and the Power to recover such Rentcharge provided by the Eleventh Section of the said Act, are hereby extended to all Cases of Sale and Purchase or Compensation under the said Act where the Parties interested in such Sale, or entitled to such Compensation, are under any Disability or Incapacity, and have no Power to sell or convey such Lands, or to receive such Compensation, except under the Provisions of the said Act.

III. The Power to sell and convey Lands in consideration of an Annual Feu Duty or Ground Annual, under the Tenth Section of the Lands Clauses Consolidation (*Scotland*) Act, 1845, and the Power to recover such Annual Feu Duty or Ground Annual, are hereby extended to all Cases of Sale, or Purchase or Compensation under the said Act, where the Parties interested in such Sale are under any Disability or Incapacity, and have no Power to sell or convey such Lands, or to receive such Compensation, except under the Provisions of the said Act.

Amount  
of Rent-  
charge to  
be settled  
in Manner  
directed  
in the 9th  
Section of  
recited  
Acts.

IV. In every Case of such Sale or Compensation by any Parties other than Parties seised in fee or entitled to dispose absolutely of the Lands so sold or damaged, the Amount of such Rentcharge, Annual Feu Duty or Ground Annual, herein-before mentioned, shall be settled in the Manner directed in the Ninth Section of each of the said Acts respectively: Provided that the Amount of such Annual Rentcharge, Annual Feu Duty or Ground Annual, shall in no case be less than One Fourth Part greater than the Net annual Rent received by the Parties beneficially interested in such Lands, upon an Average of the last Seven Years; and that a Charge of Five *per Cent.* on the gross Sum estimated or fixed as aforesaid, by way of Compensation for any Damage that may be done to the said Lands, shall in all such Cases be added to and shall form a Part of the said Rentcharge, Annual Feu Duty or Ground Annual; and

that no Fine, Foregift, Grassum, Premium, or other Consideration in the Nature thereof, shall be paid or taken in respect of the Lands so sold or damaged, other than the Annual Rentcharge, Annual Feu Duty or Ground Annual, made payable for such Lands: Provided also, that such Rentcharge shall be and remain upon and for the same Uses, Trusts, and Purposes as those upon which the Rents and Profits of the Lands so conveyed stood settled or assured at or immediately before the Conveyance thereof, and shall be a First Charge on the Tolls and Rates, if any, payable under the special Act.

V. In case the Promoters of the Undertaking shall be empowered, by any Act or Acts relating thereto, to be passed after the passing of this Act, to borrow Money to an Amount not exceeding a prescribed Sum, then in the event of the Promoters of the Undertaking agreeing at any Time after the passing of this Act with any Person, under the Powers of this Act and of either of the Acts herein-before mentioned, or of either of the said Acts, only, for the Purchase of any Lands in consideration of the Payment of a Rentcharge, Annual Feu Duty or Ground Annual, the Powers of the Promoters of the Undertaking for borrowing Money shall be reduced by an Amount equal to Twenty Years Purchase of any Rentcharge, Annual Feu Duty or Ground Annual, so for the Time being payable.

VI. The Clauses contained in "The Lands Clauses Consolidation Act (1845)," relating to the Purchase of Lands by Agreement, and to Agreements for Sale and Conveyances, Sales, and Releases of any Lands or Hereditaments, or any Estate or Interest therein, by Parties under Disability, shall extend and be applicable to all Purchases of Land and Hereditaments for public Purposes which shall be hereafter made by the Council of any City or Borough, with the Sanction of the Commissioners of Her Majesty's Treasury, under the Powers for that Purpose contained in "The Municipal Corporation Mortgages, &c. Act (1860)."

VII. For the Purchase or Acquisition of any Messuages, Lands, Tenements, and Hereditaments wanted for the Service of the Admiralty or of the War Department or for the Defence of the Realm, it shall be lawful for Her Majesty's Principal Secretary of State for the War Department for the Time being to use all or any of the Powers and Provisions by the Lands Clauses Consolidation Act, 1845, and by the Lands Clauses Consolidation (Scotland) Act, 1845, given to Promoters of the Undertaking, as therein mentioned, and for such Purposes the said Principal Secretary shall be deemed and taken to be the Promoters of an Under-

If Lands purchased by way of Rentcharge, borrowing Powers to be reduced proportionally.

Certain Clauses in 8 & 9 Vict., c. 18, extended to Purchases of Land, &c. for public Purposes.

Power to Secretary for War to use the Powers given to Promoters of Undertakings by 8 & 9 Vict., c. 18.



taking within the Meaning of the said Act, and all the Powers and Provisions thereof shall, if used by Her Majesty's Principal Secretary of State for the War Department, be treated as if they were contained in the Fifth and Sixth *Victoria*, Chapter Ninety-four, for the Purpose of being used and made available by the Principal Officers of Her Majesty's Ordnance, and had been transferred to the said Principal Secretary for the Time being by the Eighteenth and Nineteenth *Victoria*, Chapter One hundred and seventeen, for the Purposes aforesaid: Provided always, that nothing herein contained shall authorize any Purchase otherwise than by Agreement of any Land, except according to the Provisions of the Twenty-third Section of the said Act of the Fifth and Sixth *Victoria*, or prejudice or affect the Powers and Authorities of the said Principal Secretary for the Time being under the said last-mentioned Statutes, or either of them.

This Act  
and 8 & 9  
Vict., cc.  
18 and 19,  
to be con-  
strued to-  
gether.

VIII. This Act shall be read and construed as Part of the said Lands Clauses Consolidation Act, 1845, or of the Lands Clauses Consolidation (*Scotland*) Act, 1845, in all Matters in which it relates to the said Acts respectively; and in citing this Act in other Acts of Parliament, and in legal Instruments, it shall be sufficient to use the Expression of "The Lands Clauses Consolidation Acts Amendment Act, 1860."

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#### CAP. CXI.

*An Act for granting to Her Majesty certain Duties of Stamps, and to amend the Laws relating to the Stamp Duties.*—[28th August 1860.]

Most Gracious Sovereign,

WE, Your Majesty's most dutiful and loyal Subjects, the Commons of the United Kingdom of *Great Britain and Ireland* in Parliament assembled, towards raising the necessary Supplies for defraying Your Majesty's public Expenses, and making a permanent Addition to the Public Revenue, have freely and voluntarily resolved to grant unto Your Majesty the Duties herein-after mentioned; and do humbly beseech Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. From and after the Day of the passing of this Act

there shall be granted, raised, levied, and paid in and throughout the United Kingdom of *Great Britain and Ireland*, for the Use of Her Majesty, Her Heirs and Successors, for and in respect of the several Instruments, Matters, and Things described or mentioned in the said Schedule, or for or in respect of the Vellum, Parchment, or Paper upon which any of them respectively shall be written, the several Stamp Duties or Sums of Money set down in Figures against the same respectively, or otherwise specified and set forth in the said Schedule, which said Schedule, and the several Provisions, Regulations, and Directions therein contained with respect to the said Duties, and the Instruments, Matters, and Things charged therewith, shall be deemed and taken to be Part of this Act, and shall be applied and put in Execution accordingly: Provided that nothing herein contained shall in any way alter or affect the Act passed in the Twelfth and Thirteenth Years of the Reign of Her present Majesty, entitled *An Act to confer certain Powers on the Railway Passengers Assurance Company*, or the Duties thereby imposed.

II. The Stamp Duties now payable for and in respect of the several Instruments, Matters, and Things mentioned or described in the Schedule to this Act annexed, whereon other Duties are by this Act granted, shall respectively from and after the Day of the passing of this Act cease and determine, and the same are hereby repealed: Provided that the Stamp Duties now chargeable on any of the said Instruments, Matters, and Things, and not the said other new Duties, shall be payable in respect of such of them as shall be made, signed, or dated at any Time before or upon the Day of the passing of this Act.

III. From and after the Thirty-first Day of *December* One thousand eight hundred and sixty, the Allowances granted respectively by the Eighteenth Section of the Act passed in the Thirteenth and Fourteenth Years of Her Majesty, Chapter Ninety-seven, in respect of Stamps for Receipts, and by the Twenty-fourth Section of the Act passed in the Seventeenth and Eighteenth Years of Her Majesty, Chapter Eighty-three, in respect of Stamps for Drafts, Bills, and Notes, and any Allowance granted by or payable under any other Act in respect of any of the Stamps herein-after mentioned, shall cease; and in lieu thereof there shall be granted and allowed to every Person who at one and the same Time shall produce at the Office of the Commissioners of Inland Revenue in *London or Dublin* Paper to be stamped with Stamps for denoting any Rate of Duty not exceeding One Shilling on Bills of Exchange, Drafts, or Orders, or Promissory Notes, or

After passing of this Act the Duties described in Schedule to be charged.

Stamp Duties now payable on Instruments, &c., mentioned in Schedule repealed.

Allowances on Bill and Receipt Stamps granted by Acts 18 & 14 Vict., c. 97, and 17 & 18 Vict., c. 83, to cease, and an Allowance granted in lieu thereof.

Stamps for denoting the Duty of One Penny on any Instrument or Document whatever (except Postage Stamps and Customs Stamps), to the Amount of Two Pounds or upwards in the whole of all or any of such Stamps as aforesaid, and to every Person who at one and the same Time shall Purchase any such Stamps as aforesaid at the Office of the said Commissioners in *London, Edinburgh, or Dublin*, to the Amount aforesaid, or of any Distributor or Sub-Distributor of Stamps at any Place not within the Distance of Ten Miles from the said Offices respectively, to the Amount of One Pound or upwards, an Allowance of Tenpence for every Twenty Shillings of the Amount of the Duties denoted by such Stamps.

Provisions  
of former  
Acts to  
apply to  
this Act.

IV. All the Powers, Provisions, Clauses, Regulations, Directions, Allowances, and Exemptions, Fines, Forfeitures, Pains, and Penalties, contained in or imposed by any Act or Acts, or any Schedule thereto, relating to any Duties of the same Kind or Description heretofore payable in the United Kingdom and in Force at the Time of the passing of this Act, shall respectively be of full Force and Effect with respect to the Duties by this Act granted, and to the Vellum, Parchment, Paper, Instruments, Matters, and Things charged and chargeable therewith, and to the Persons liable to the Payment of the said Duties, so far as the same are or shall be applicable in all Cases not hereby expressly provided for; and shall be observed, applied, allowed, enforced, and put in Execution for and in the raising, levying, collecting, and securing of the said Duties hereby granted, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express Provisions of this Act, as fully and effectually to all Intents and Purposes as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the Duties by this Act granted.

The Duties  
on Foreign  
Promissory  
Notes to be  
denoted by  
adhesive  
Stamps.

V. The Duties by this Act granted on Promissory Notes made or purporting to be made out of the United Kingdom shall be denoted by adhesive Stamps, to be provided by the Commissioners of Inland Revenue for the Purpose, or by any Stamps of sufficient Amount which shall have been provided for denoting the Duties on Bills of Exchange made out of the United Kingdom; and the proper adhesive Stamp for denoting the Duty on any such Note shall be affixed thereon, and be cancelled at the same Time and Times, and in like Manner as is provided by the Fifth Section of an Act passed in the Seventeenth and Eighteenth Years of Her present Majesty, Chapter Eighty-three, and the Twelfth Section of an Act passed in the present Session, Chapter Fifteen, in the case of Bills of Exchange therein respectively

mentioned, and under the like Penalties respectively for any Neglect thereof; and the said respective Sections shall be read as if the same were inserted in this Act expressly in reference to the Promissory Notes aforesaid, and the Duties by this Act granted thereon, as well as to the Bills of Exchange therein respectively mentioned.

VI. The Term "Contract Note," wherever the same is used in this Act, shall mean any Note or Memorandum mentioned or referred to under the Head Contract Note in the Schedule to this Act; and the Term "Insurance" shall mean also and shall include the Term "Assurance."

Construction of Terms "Contract Note" and "Insurance."

VII. The Stamp Duty on Contract Notes may be denoted either by impressed or adhesive Stamps, and the said Commissioners shall provide Stamps of both Descriptions; and in any Case where a Contract Note is made, and the same is not written on an impressed Stamp, there shall be affixed thereon a proper adhesive Stamp; and every Person who shall make or sign a Contract Note to which an adhesive Stamp shall be affixed shall effectually cancel and obliterate the Stamp by writing upon or across it his Name or the Name of his Firm, or the Initials thereof respectively, and by adding thereto the Date of such cancelling, and so and in such Manner that the said Stamp cannot be used upon or for any other Document or Writing; and if any Person shall make or sign any Contract Note by this Act chargeable with Stamp Duty without the same being duly stamped to denote the said Duty; or shall refuse or neglect to cancel and obliterate as aforesaid any adhesive Stamp affixed thereon, he shall forfeit the Sum of Twenty Pounds; and no Charge for Brokerage, Commission, Agency, or otherwise, made or to be made by any Broker, Agent, or other Person in or about the Sale or Purchase mentioned or referred to in any Contract Note made or signed by him, shall be lawful unless such Contract Note shall be duly stamped, and the Stamp thereon, if adhesive, properly cancelled.

Stamps on Contract Notes may be impressed or adhesive; if adhesive, to be cancelled.

VIII. Where any Insurance in respect of which a Policy or Agreement is chargeable with Stamp Duty under this Act shall be renewed or continued on the Payment of further Premium or Consideration, whether in pursuance of any Stipulation in the Policy or Agreement or otherwise, a Receipt for such further Premium or Consideration shall be given by the Person who shall receive the same, and such Receipt shall for the Purposes of this Act be and be deemed the Policy or Agreement for such renewed or continued Insurance and be chargeable with the Duty by this Act granted; and if any Person shall receive any Money for Premium or Consideration for any such Insurance, and shall not within a Month make out and, if required, deliver a duly

On Renewal of Insurance the Receipt to be chargeable with the Duty.

stamped Policy or Agreement in respect thereof; or in the Case of a Renewal or Continuance of such Insurance, shall not thereupon give such Receipt as aforesaid duly stamped; or if any such Person shall deliver or cause to be delivered any Policy or Agreement, or give or cause to be given any Receipt not duly stamped, he shall forfeit the sum of Twenty Pounds; and where the Insurance shall be made, renewed, or continued by or for any Society or Company, the Person who shall be a managing Director, or the Secretary or other principal Officer thereof, at the Time of the Payment of any such Premium or Consideration, and of any such Default or unlawful Act being done or suffered as aforesaid, shall be held and deemed to be a Person doing or suffering the Default or unlawful Act, and shall, as well as the Society or Company, and the Members thereof who may by Law be chargeable therewith, be subject and liable to the said Penalty in respect thereof.

Adhesive  
or impressed  
Stamps,  
or both,  
may be  
used for  
Insurances

IX. The Duties hereby granted on Instruments of Insurance may be denoted by any adhesive Stamps that the Commissioners of Inland Revenue may provide for the Purpose, and in the meanwhile by any adhesive Stamps provided by them not appropriated by Name to any other Instrument, as well as by impressed Stamps, or by a Combination of both impressed and adhesive Stamps; and in any Case where an adhesive Stamp is issued it shall be cancelled by writing upon the Stamp the Name of the Person or the Society or Company making the Insurance, or the Initials thereof, and the Date of Writing the same, and also any Particulars relating to the Insurance for which the Stamp may be adapted; and in default thereof such Person or Society or Company, and also the managing Director, Secretary, or other principal Officer as aforesaid of any such Society or Company, shall forfeit the Sum of Ten Pounds.

The Stamp  
Duty on  
Policies of  
Insurance  
on Lives  
for Sums  
not exceed-  
ing £25 re-  
duced.

X. Whereas it is expedient to reduce the Stamp Duty now chargeable on Policies of Insurance upon Lives for small Sums: Be it enacted, In lieu of the Stamp Duty of Sixpence now payable upon or for or in respect of any Policy of Insurance or other Instrument by whatever Name the same shall be called, whereby any Insurance shall be made upon any Life or Lives, or upon any Event or Contingency relating to or depending upon a Life or Lives, where the Sum insured shall not exceed Twenty-five Pounds, there shall be charged and payable the Stamp Duty of Threepence.

No Duty  
on Insur-  
ance of  
Workmen's  
Tools not  
exceeding  
£20.

XI. No Insurance from Loss or Damage by Fire in any Sum not exceeding Twenty Pounds, made, renewed, or continued at the Instance or for the Benefit of any Working Mechanic, Artificer, Handicraftsman, or Labourer on the Tools or Implements of Work or Labour used by any such Person

in his Work or Employment, shall be chargeable with any Stamp Duty ; provided that such Insurance be effected by a separate Policy, or that a distinct Sum be assured on such Tools or Instruments.

XII. The Stamp Duty of Sixpence by the Act of the present Session of Parliament, Chapter Fifteen, charged on an Agreement under Hand only may be denoted by an adhesive Stamp in any Case where the same is capable of being used under the Terms and Restrictions herein-after mentioned ; and the Commissioners of Inland Revenue shall provide Stamps for the Purpose ; and whenever any such adhesive Stamp shall be used, every Party to the Agreement who shall sign the same, shall also at the Time of so signing write upon or across the Stamp his Name and the Date of the Day and Year of writing the same, so that the Stamp may be appropriated to the Instrument, and effectually cancelled and rendered incapable of being used for any other ; and in default thereof the Stamp shall be of no Avail ; and Proof of the said Writing upon or across the Stamp, as hereby required, shall be a necessary Part of the Evidence of the Agreement in any Case where such Agreement is not stamped with an impressed Stamp.

XIII. Every Writing or Document entitling or intended to entitle any Person to the Delivery of any Goods, Wares, or Merchandise lying in any Dock, Port, or Warehouse, or upon any Wharf, as in the said Act of the present Session is mentioned, shall be deemed to be made and given upon a Sale or Transfer of the Property in such Goods, Wares, or Merchandise, unless the contrary shall be expressly stated therein by the Person making or giving the same ; and if any Person shall untruly state or by any Word or Words signify or cause or permit to be untruly stated or signified in any such Writing or Document that the same is not made or given upon a Sale or Transfer ; or if any Person shall himself or by his Servant or other Person procure or require the Delivery of any of the Goods, Wares, or Merchandise therein mentioned, knowing that the same contains any such untrue Statement, every such Person shall forfeit, over and above any other Penalty to which he may be liable, the Sum of Twenty Pounds ; but any such Writing or Document shall not, by reason of the same not being stamped, be invalid in the Hands of the Person having the Custody of the Goods, Wares, and Merchandise, and delivering out the same, unless such Person shall be Party or privy to the Fraud thereby committed.

XIV. The Stamp Duty of One Penny payable on any such Writing or Document as in the last preceding Clause is mentioned shall, in the Absence of any special Agree-

The Stamp  
on an  
Agreement  
may be ad-  
hesive.

Every De-  
livery  
Order to be  
deemed to  
be upon a  
Sale or  
Transfer  
unless  
otherwise  
stated.  
Penalty  
for false  
Statement.

Order not  
to be in-  
valid

The Stamp  
Duty on a  
Delivery  
Order to be

paid by the  
Person re-  
quiring  
the Order.

ment between the Parties relating to it, be paid by the Person requiring the Writing or Document; and it shall be lawful, in any such Case, for the Person of whom the Writing or Document is required to refuse to give the same until the Amount of the Stamp Duty thereon be paid to him.

Weight-  
Notes not  
to be liable  
as Dock  
Warrants.

XV. Whereas a Practice prevails in relation to certain Descriptions of Goods, Wares, and Merchandise lying in Docks and Warehouses, and upon Wharfs, for the Company or Person in whose Custody the same may be to deliver to the Owner thereof, in addition to a Warrant evidencing the Title to the Property, a certain other Document termed a Weight-Note, such Document being intended to be delivered by or on behalf of the Owner to the Purchaser of the Goods mentioned in the Warrant upon any Sale thereof before the Completion of the Contract for Sale, but which other Document as well as the Warrant is chargeable with the Duty of Threepence under the Head Dock Warrant in the Schedule to the said Act of the present Session, and it is expedient that the same should be exempted from the said Duty: Be it therefore enacted, In any Case where a Document designated a Warrant, chargeable with and duly stamped for denoting the Payment of the said Duty of Threepence, and also a Document termed a Weight-Note, or any other Document of the like Character or Description relating only to the same Goods, Wares, or Merchandise as are specified in the Warrant, shall be issued by the Company or Person in whose Custody the said Goods, Wares, or Merchandise shall be, to the Owner thereof or his Broker or Agent, the Weight-Note or other Document aforesaid shall be exempt from the said Duty of Threepence.

Certain  
Copies or  
Extracts  
from Re-  
gisters not  
to be  
charge-  
able with  
Stamp  
Duty.

XVI. The Stamp Duty of One Penny by the said Act of the present Session charged upon a certified Copy or Extract of or from any Register of Births, Baptisms, Marriages, Deaths, or Burials shall not be deemed to have been or to be payable upon any such Copy or Extract which is or shall be furnished by any Clergyman, Registrar, or other official Person, pursuant to and for the Purposes of any Act of Parliament, or to any General or Superintending Registrar under any General Regulation, nor in any Case where the Person giving the Copy or Extract is not entitled to any Fee or Reward for the same.

Certain  
Orders on  
Bankers  
not to be  
subject  
to more  
than a  
Penny  
Stamp.

XVII. No Draft, or Order, Writing, or Document for the Payment or for entitling any Person to the Payment by or through any Banker or Person acting as a Banker of any Sum of Money, such Draft, Order, Writing, or Document being sent or delivered by the Person making or giving the same to the Banker or Person acting as a Banker

by or through whom the Payment is to be made, and not to the Person to whom such Payment is to be made or to any Person on his Behalf, shall be chargeable or be deemed to have been chargeable with any higher Stamp Duty than One Penny, notwithstanding the said Payment shall be or have been thereby directed to be made at any Time after the Date thereof, which Duty of One Penny may be denoted by an adhesive Stamp to be cancelled as in the Case of a Draft or Order on Demand.

XVIII. Where any Draft or Order for the Payment of Bankers Money by any Banker or Person acting as a Banker, may affix chargeable with the Stamp Duty of One Penny, shall come to Drafts Stamps to the Hands of such Person unstamped, it shall be lawful for him to affix thereto the necessary adhesive Stamp, and upon them. to cancel the same in manner by Law required, and upon so doing to make the Payment thereby directed, and to charge the Duty in Account against the Person who ought to have paid the same, or to deduct such Duty from the Sum so directed to be paid; and such Draft or Order shall, so far as relates to the Stamp Duty chargeable thereon, be good and valid; but this shall not relieve any Person from the Liability to the Penalty he may have incurred by issuing the said Draft or Order unstamped.

XIX. Whereas by the Eighteenth Section of the Act Sect. 18 of 55 Geo. 3, c. 184, prohibiting the issuing of Bankers Notes with printed Dates, repealed. passed in the Fifty-fifth Year of the Reign of King George the Third, Chapter One hundred and eighty-four, the issuing of Promissory Notes payable to Bearer on Demand with printed Dates therein is prohibited, and such Prohibition is an unnecessary Restriction: Be it enacted, That the said Section of the said last-mentioned Act shall be and is hereby repealed: Provided always, that, notwithstanding anything in any Act of Parliament contained to the contrary, it shall be lawful for any Person to draw upon his Drafts on Bankers for less than 20s. to be lawful. Banker, who shall *bonâ fide* hold Money to or for his Use, any Draft or Order for the Payment, to the Bearer or to Order on Demand, of any Sum of Money less than Twenty Shillings.

XX. Whereas by an Act passed in the Fiftieth Year of the Reign of King George the Third, Chapter Forty-one, to Hawkers and Pedlars granted in England or Scotland to be good for any Part of Great Britain. every Hawker, Pedlar, and Petty Chapman, and other trading Person going from Town to Town or to other Men's Houses, in *England, Wales, or Berwick-upon-Tweed* is required to take out a Licence as therein mentioned, and by an Act passed in the Fifty-fifth Year of the Reign of the said King, Chapter Seventy-one, such trading Persons in *Scotland* are also required to take out a Licence: Be it enacted, That a Licence taken out under either of the said



Acts shall be sufficient to authorize the trading, according to the Tenor of it, in any Part of *Great Britain*, and shall be read as a Licence granted under both of the said Acts.

Commissioners of Inland Revenue may remit Penalties under the said Acts.

XXI. If any Person be convicted of an Offence under either of the said Two last-mentioned Acts, it shall be lawful for the Commissioners of Inland Revenue, and they are hereby authorized, in case they shall see fit so to do, to remit the whole or any Part of the Penalty imposed by Law for such Offence, notwithstanding the same or some Portion thereof may be payable to some Party other than the Crown.

Persons in the Service of the Post Office may sell Postage Stamps, &c., without Licence.

XXII. It shall be lawful for any Person in the Service or Employment of the Post Office, without any Licence or any Authority other than this Act, to carry about for Sale and to sell at any Place or Places within the United Kingdom, Postage Stamps and printed Forms of any Kind issued from or used at the General Post Office, and any other Matters and Things relating to the Business of the Post Office which are or may be authorized or permitted to be sold at any Post Office; and such Person shall not be subject or liable to any Penalty or Forfeiture for so doing, anything in any Act or Acts to the contrary notwithstanding.

20 & 21 Vict., c. 77, Probates and Administrations, England.

XXIII. Whereas by the Act passed in the Twentieth and Twenty-first Years of Her Majesty's Reign, Chapter Seventy-seven, for amending the Law relating to Probates and Letters of Administration in England, it is enacted that none of the Fees payable to the Officers of the Court of Probate, or of any County Court, in respect of Business under the Act, except the Fees of District Registrars (which were to be taken as their Remuneration, and for their own Use), should be received in Money, but that every such Fee should be collected and received by a Stamp denoting the Amount of the Fee which otherwise would be payable, and Provisions were therein made for the proper Collection of such Fees; and it was also enacted, that it should be lawful for the Commissioners of Her Majesty's Treasury at any Time to order that the District Registrars or any of them should be paid by Salaries instead of Fees, and that thereupon all Fees payable to them should be accounted for and paid into the Exchequer as the said last-mentioned Commissioners should direct; and by an Act passed in the same Year, Chapter Seventy-nine, for amending the Law relating to Probates and Letters of Administration in *Ireland*, similar Enactments are contained; and it may be considered expedient in Cases where the said last-mentioned Commissioners shall have directed or shall at any Time direct the District Registrars in *England* or *Ireland* to be

20 & 21 Vict., c. 79, Ireland.

paid by Salaries instead of Fees, that such Fees should also be collected and received by means of Stamps: Be it therefore enacted as follows, In any Case where the Commissioners of Her Majesty's Treasury have ordered or shall at any Time hereafter order that any District Registrar, under either of the said Acts, shall be paid by Salary, it shall be lawful for them at any Time to order also that the Fees or any of the Fees authorized to be taken by such District Registrar shall be collected and received by means of Stamps; and thereupon, from and after the Time to be fixed for that Purpose by any such last-mentioned Order, every such Fee shall be collected and received by a Stamp denoting the Amount of the Fee which otherwise would be payable, in the same Manner and under and subject to the same Provisions, Clauses, Regulations, and Directions in that Behalf as are contained in the said Acts respectively, in relation to the Fees thereby directed to be collected and received by means of Stamps, and to the Documents which ought to be stamped to denote such Fees, as if such Fees had not been excepted as aforesaid, but had been expressly directed by the said respective Acts to be collected and received by means of Stamps, as other Fees are thereby respectively directed to be collected and received.

If Treasury direct District Registrars to be paid by Salary, they may also direct the Fees to be collected, &c. by means of Stamps.

**SCHEDULE** referred to, containing the Duties by this Act imposed.

**AWARD** in England or Ireland, and Award or Decreet Arbitral in Scotland :

	£	s.	d.
Where the Amount or Value of the Matter in Dispute shall not exceed 50 <i>l.</i> . . . . .	0	2	6
And where it shall exceed 50 <i>l.</i> and not exceed 100 <i>l.</i> . . . . .	0	5	0
And where it shall exceed 100 <i>l.</i> and not exceed 200 <i>l.</i> . . . . .	0	10	0
And where it shall exceed 200 <i>l.</i> and not exceed 500 <i>l.</i> . . . . .	0	15	0
And where it shall exceed 500 <i>l.</i> and not exceed 750 <i>l.</i> . . . . .	1	0	0
And where it shall exceed 750 <i>l.</i> and not exceed 1000 <i>l.</i> . . . . .	1	5	0
And where it shall exceed 1000 <i>l.</i> , and also in all other Cases not above provided for . . . . .	1	15	0

**CONTRACT NOTE.** Any Note, Memorandum, or Writing, commonly called a Contract Note, or by whatever Name the same may be designated, for or relating to the Sale or Purchase of any Government or other Public Stocks, Funds, or Securities, or any Stocks, Funds, or Securities, or Share or Shares of or in any Joint Stock or other public Company, to the Amount or Value of 5*l.* or upwards . . . . .

0 0 1

**LEASE.** Any Assignment or Surrender of a Lease or Tack for a Term of Years exceeding Thirty-five, upon any other Occasion than a Sale or Mortgage . . . . .

A Duty equal to the ad valorem Duty with which a similar Lease or Tack would be chargeable, but no higher Duty than 1*l.* 15*s.* shall be charged.

**POLICY OF ASSURANCE** or Insurance, by whatever Name the same shall be

called, whereby any Sum of Money £ s. d.  
shall be assured, or agreed to be paid  
only upon the Death of any Person,  
from or by reason of any Cause inci-  
dent to or consequent upon travelling,  
whether by Land or Water, or any  
Accident or external Violence, or any  
Cause whatever other than a natural  
Cause; or whereby any Compensation  
shall be assured or agreed to be made  
or paid for personal Injury received  
from any Cause whatever; or whereby  
both a Sum of Money upon Death and  
a Compensation for personal Injury as  
aforesaid shall be assured and agreed  
to be paid, or whereby any Assurance  
or Insurance shall be made upon Glass  
from Loss or Damage of any kind ex-  
cept by Fire,

Where the Premium or Consideration for such Assurance, Insurance, or Agreement shall not exceed Two Shillings and Sixpence . . .	0 0 1
And where the same shall exceed Two Shillings and Sixpence and shall not exceed Five Shillings . .	0 0 3
And where the same shall exceed Five Shillings, then for every Five Shillings and also for every frac- tional Part of Five Shillings . .	0 0 3

**PROMISSORY NOTE** made in the United  
Kingdom for the Payment of any Sum  
of Money exceeding 4000*l*.

For every 1000 <i>l</i> . or Part of 1000 <i>l</i> . of the Money thereby made payable .	0 10 0
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Foreign <b>PROMISSORY NOTE</b> made or purporting to be made out of the United Kingdom for the Payment within the United Kingdom of any Sum of Money . . . . .	{	The same Duty as on an Inland Bill of Exchange for the Payment otherwise than on Demand of Money of the same Amount.
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## CAP. CXXVII.

*An Act to amend the Laws relating to Attorneys, Solicitors, Proctors, and Certificated Conveyancers.*—[28th August 1860.]

§ XV. Every Person who has been admitted and enrolled as a Writer to the Signet, or as a Solicitor in the Supreme Courts of *Scotland*, or as a Procurator before any of the Sheriff Courts of *Scotland*, and who, after being so admitted and enrolled, has been bound by and has duly served under Articles of Clerkship in *England* or *Wales* to a practising Attorney or Solicitor for the Term of Three Years, and has been examined and sworn in Manner directed by the first herein-before mentioned Act and by this Act, may be admitted and enrolled as an Attorney and Solicitor; and Service for any Part of the said Term not exceeding One Year with the *London* Agent of such Attorney or Solicitor in the proper Business, Practice, or Employment of an Attorney or Solicitor, either by virtue of any Stipulation, or with the Permission of such Attorney or Solicitor, shall be and be deemed to have been good Service under such Articles for such Part of the said Term.

§ XXXV. This Act shall only extend to *England* and *Wales*, save as herein otherwise expressly provided.

## CAP. CXLIII.

*An Act to extend certain Provisions of the Titles to Land (Scotland) Act, 1858, to Titles to Land held by Burgage Tenure; and to amend the said Act.*—[28th August 1860.]

21 & 22  
Vict., c. 76. WHEREAS it is expedient to extend certain provisions of “the Titles to Land (*Scotland*) Act, 1858,” to Titles to Land held by Burgage Tenure, and also to amend the said Act: Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short  
Title. I. This Act may be cited for all Purposes as “The Titles to Land (*Scotland*) Act, 1860.”

Interpre-  
tation of  
Terms. II. The following Words in this and the recited Act, and in the Schedules hereunto and to the recited Act annexed, shall have the several Meanings hereby and in the recited

Act assigned to them, unless there be something in the Subject or Context repugnant to such Construction; that is to say, the Word "Deed" and the Word "Conveyance" shall extend to and include original Charters, Charters and Writs and Procuratories of Resignation, Charters of Adjudication and Sale, Dispositions, Bonds and Dispositions in Security, Bonds of Annuity and of Annual Rent, and other Heritable Bonds, Feu Contracts, Contracts of Ground Annual, Decrees of Adjudication, Decrees of Sale (whether such Decrees of Adjudication or Decrees of Sale contain Warrant for Infestment or not), Decrees of Special Service, Precepts from Chancery, Precepts and Writs of Clare constat, Writs of Acknowledgment, Contracts of Excambion, and other Deeds and Decrees by which Lands are conveyed, or Rights in Lands, either absolute or redeemable or in Security, are constituted or conveyed; and official Extracts of any such Deeds, Conveyances, and Decrees, and all Codicils, Deeds of Nomination, Decrees of Declarator, and other Writings bearing Reference to Conveyances separately granted, and naming or appointing Persons to exercise or enjoy the Rights or Powers conferred by such Conveyances, shall be deemed and taken, for the Purposes of this Act, to be Parts of the Conveyances to which they separately bear reference; the Word "Lands" shall extend to and include all Heritable Subjects, Securities, and Rights; the Words "by Burgage Tenure" and the Words "held Burgage" shall extend to and include any Mode of Tenure known and effectual in Law similar to Burgage Tenure.

III. It shall not be necessary to expedite and record an Instrument of Sasine, or of Resignation and Sasine, on any Conveyance of Lands held Burgage, according to the present Law and Practice; but it shall be competent and sufficient for the Person in whose favour the Conveyance is granted, instead of expediting and recording such Instrument, to record the Conveyance itself in the Register of Sasines applicable to the Lands therein contained; and the Conveyance shall be presented for Registration with a Warrant of Registration thereon, in or as nearly as may be in the Form No. 1 of Schedule (A.) to this Act annexed, specifying the Person on whose Behalf it is presented, and signed by such Person, or his Agent; and such Conveyance, being so presented, and recorded along with such Warrant, shall have the same legal Force and Effect in all respects as if Resignation of such Lands had taken place in due Form, and as if the Conveyance had been followed by an Instrument of Sasine or of Resignation and Sasine duly expedite and recorded at the Date of recording the Conveyance, according to the present Law and Practice, in favour

of the Person on whose Behalf the Conveyance is presented for Registration.

Not necessary to record the whole Conveyance.

IV. Where a Conveyance of Lands held Burgage is contained in a Deed granted for farther Purposes and Objects, such as a Marriage Contract, Deed of Trust, or Deed of Settlement, it shall not be necessary to record the whole of such Deed, but it shall be competent and sufficient to expedite a Notarial Instrument, setting forth generally the Nature of the Deed, and containing at length those Portions of the Deed by which such Lands are conveyed, and by which Real Burdens, Conditions, or Limitations are imposed, and to record such Instrument in the appropriate Register of Sasines; and where a Deed conveys separate Lands, or separate Interests in the same Lands, to the same or different Persons, it shall not be necessary to record the whole of such Deed, but it shall be competent and sufficient to expedite and record as aforesaid a Notarial Instrument, setting forth generally the Nature of the Deed, and containing at length the Part or Parts of the Deed by which particular Lands are conveyed to the Person in whose Favour the Notarial Instrument is expedite, and the Part of the Deed which specifies the Nature and Extent of the Right and Interest of such Person, with the Real Burdens, Conditions, and Limitations, if any; and such Notarial Instrument shall be in or as nearly as may be in the Form of Schedule (B.) to this Act annexed.

Clause directing Part of Conveyance to be recorded.

V. Immediately before the Testing Clause of any Conveyance of Lands held Burgage, it shall be competent to insert a Clause of Direction in or as nearly as may be in the Form of Schedule (C.) to this Act annexed, specifying the Part or Parts of the Conveyance which the Granter thereof desires to be recorded in the Register of Sasines, and when such Clause is so inserted, and Reference made thereto in the Warrant of Registration to be endorsed thereon in Terms of this Act, the Keeper of the appropriate Register of Sasines shall record such Part or Parts only, together with the Clause of Direction and the Testing Clause; and the recording of such Part or Parts of the Conveyance, together with the Clause of Direction and the Testing Clause, and the Warrant of Registration, as before provided, shall have the same legal Effect as if a Notarial Instrument, containing such Part or Parts of the Conveyance, had been duly expedite and recorded in Favour of the Person on whose Behalf the Conveyance is presented: Provided that, notwithstanding such Clause of Direction, it shall be competent for the Person entitled to present the Conveyance for Registration, to record the whole Conveyance, or to expedite and record a Notarial Instrument, as

herein-before provided, in the same Manner as if the Conveyance had contained no such Clause of Direction; and where a Notarial Instrument shall be expedé, as herein-before provided, no Part or Parts of the Conveyance directed to be recorded shall be omitted from such Instrument.

VI. It shall not be necessary to insert in any Conveyance of Lands held Burgage a Clause of Obligation to infeft, or a Procuratory or Clause of Resignation.

VII. It shall be competent for the Heir of any Person who died last vest and seised in any Lands held Burgage, to obtain from the Magistrates of the Burgh within which such Lands are situate a Writ of Clare constat in or as nearly as may be in the Form of Schedule (D.) to this Act annexed; or, in his Option, it shall be competent to such Heir to apply for and obtain Decree of Special Service by the Sheriff of Chancery, or by the Sheriff of the County within which such Burgh is situate, in the same Manner in all respects as if such Lands were not held Burgage; and such Writ of Clare constat or Decree of Special Service may be recorded in the appropriate Register of Sasines, and when so recorded, with Warrant of Registration thereon, shall have the same Effect in all respects as if Cognition and Entry of such Heir had taken place in due Form, and an Instrument of Cognition and Sasine in regard to such Lands, and in favour of such Heir, had been duly expedé and recorded, according to the present Law and Practice.

VIII. When any Person shall have granted or shall grant a general Conveyance comprehending Lands held Burgage, whether by Deed *mortis causâ* or *inter vivos*, it shall be competent to the Disponee under such Conveyance, or to any other Person who shall have acquired Right to such Conveyance, in whole or in part, to expedé and record as aforesaid a Notarial Instrument in or as nearly as may be in the Form of Schedule (E.) to this Act annexed; and such Notarial Instrument, being duly recorded in the appropriate Register of Sasines, shall be equivalent to an Instrument of Resignation and Sasine duly expedé and recorded, following on a Disposition of the Lands and Resignation thereof in due Form; and when Heritable Securities are contained in such Notarial Instrument, the Instrument so expedé and recorded shall, along with its Warrants, be equivalent to an Assignment of such Heritable Securities executed by the Granter of the general Conveyance, and duly recorded in the appropriate Register of Sasines: Provided that where such Notarial Instrument shall be expedé by a Person other than the original Disponee under such general Conveyance, the Notarial Instrument shall set forth

Certain  
Clauses  
not neces-  
sary in  
Convey-  
ances.

Heir in  
Burgage  
Subjects  
may make  
up Title  
by Writ  
of Clare  
Constat  
or by  
Special  
Service.

Notarial  
Instru-  
ments in  
favour of  
General  
Disponees  
authorized.



the Title, or Series of Titles, by which the Person in whose Favour the Instrument is expedite acquired Right to such Conveyance, and the Nature and Extent of his Right.

Forms of  
Assigna-  
tions to  
unrecorded  
Convey-  
ances.

IX. It shall be competent to any Person, in right of an unrecorded Conveyance of Lands held Burgage, to assign the Conveyance in or as nearly as may be in the Form No. 1. of Schedule (F.) to this Act annexed, and the Assignment, or in the event of there being more than One, the successive Assignations, may be recorded in the appropriate Register of Sasines, along with the Conveyance itself, and a Warrant of Registration thereon, in or as nearly as may be in the Form No. 2. of Schedule (A.); and it shall be competent to write the Assignment or Assignations on the Conveyance itself in or as nearly as may be in the Form No. 2. of Schedule (F.), in which Case the Assignment or Assignations and the Conveyance may be recorded along with the Warrant of Registration thereon, which shall be in or as nearly as may be in the Form No. 1. of Schedule (A.); and the Conveyance, with the Warrant of Registration, and the Assignment or Assignations, separate from or written upon the Conveyance, being so recorded, shall operate in favour of the Assignee on whose Behalf they are presented for Registration, as fully and effectually as if the Lands contained in the Assignment, or, if there be more than One, in the last Assignment, had been disposed by the original Conveyance in favour of such Assignee, and the Conveyance, with the Warrant of Registration, had been recorded in the Manner herein-before provided of the Date of recording such Conveyance and Assignment or Assignations.

Notarial  
Instru-  
ments in  
favour of  
Persons  
acquiring  
Rights to  
unrecorded  
Convey-  
ances au-  
thorized.

X. When any Person shall have acquired Right by general Conveyance, Service, Assignment, Adjudication, or otherwise, to an unrecorded Conveyance of Lands held Burgage granted in favour of another Person, it shall be competent to such first-mentioned Person to expedite, as aforesaid, a Notarial Instrument, in or as nearly as may be in the Form of Schedule (G.) to this Act annexed, setting forth the Conveyance and the Title or Series of Titles by which he acquired Right to the same, and the Nature and Extent of his Right, and to record the Conveyance along with the Notarial Instrument in the appropriate Register of Sasines; or where it is not desired to record the whole of the Conveyance, it shall be competent to expedite, as aforesaid, a Notarial Instrument, in or as nearly as may be in the Form of Schedule (B.), setting forth generally the Nature of the Deed, and containing at length those Portions of the Deed by which the Lands in regard to which the said Instrument is expedite are conveyed, and by which

real Burdens, Conditions, or Limitations are imposed, and also setting forth the Title or Series of Titles by which the Party acquired Right to the Conveyance, and the Nature and Extent of his Right; and to record such Notarial Instrument in the appropriate Register of Sasines; and the Conveyance, with a Warrant of Registration thereon, along with such Notarial Instrument in the Form of Schedule (G.), or such Notarial Instrument in the Form of Schedule (B.), being so recorded, shall be equivalent to a Conveyance in favour of the Person expeding the Instrument, duly recorded along with a Warrant of Registration in the Manner herein-before provided.

XI. When any Lands held Burgage are or shall here-  
after be held under a Deed of Entail, it shall not be neces-  
sary to repeat the Destination contained in such Entail at  
length in the Conveyances, Instruments of Sasine or of  
Resignation and Sasine or of Cognition and Sasine, Instru-  
ments of Cognition, Notarial Instruments, or other Deeds  
necessary to transmit, renew, or complete a Title under  
such Entail; but it shall be sufficient to refer to the Desti-  
nation as set forth at full Length in the Deed of Entail  
recorded in the Register of Tailzies, if the same shall have  
been so recorded, or as set forth at full Length in any Con-  
veyance, Instrument of Sasine, or of Resignation and Sasine,  
or of Cognition and Sasine, Instrument of Cognition, No-  
tarial Instrument, or other Deed containing such Lands  
duly recorded in the appropriate Register of Sasines, and  
forming Part of the Progress of Title Deeds of the Lands  
comprehended under such Entail, such Reference being  
made in the Terms, or as nearly as may be in the Terms,  
set forth in No. 2. of Schedule (H.); and the Reference so  
made to such Destination shall be equivalent to the full  
Insertion thereof, and shall to all Intents and in all Ques-  
tions whatever have the same legal Effect as if the Desti-  
nation in the recorded Conveyance, Instrument, or other  
Deed referred to had been inserted at length, notwith-  
standing any Law or Practice to the contrary, or any  
Injunction to the contrary contained in such Deed of Entail,  
and notwithstanding any Enactments or Provisions to the  
contrary contained in any Act or Acts of Parliament now  
in force, all which are hereby repealed, so far as inconsistent  
herewith, but no farther.

XII. When a Deed of Entail comprehending any Lands  
held Burgage contains an express Clause authorizing Re-  
gistration of the Deed in the Register of Tailzies, it shall  
not be necessary to insert Clauses of Prohibition against  
Alienation, contracting Debt, and altering the Order of  
Succession, but such Clause of Registration shall have in

Destina-  
tions in  
Entails  
may be re-  
ferred to.

Certain  
Clauses  
in Entails  
no longer  
necessary

every respect the same Operation and Effect as if such Clauses of Prohibition had been inserted according to the present Law and Practice, and duly fenced with irritant and resolute Clauses.

Recording  
of Convey-  
ances in  
the Regis-  
ter of Sa-  
sines au-  
thorized.

XIII. All Conveyances, with Warrants of Registration written thereon, Instruments of Cognition, and other Notarial Instruments, hereby authorized to be recorded in the Register of Sasines, may be recorded at any Time in the Life of the Person on whose Behalf the same shall be presented for Registration, in the same Manner as Instruments of Sasine, or of Resignation and Sasine, or of Cognition and Sasine, and the Keepers of such Register are hereby authorized and required to record the same accordingly, when presented for that Purpose; and the Date of Entry in the Minute Book shall be held to be the Date of Registration; and the Date of Registration of all such Conveyances, Instruments of Cognition, and other Notarial Instruments, shall be equivalent to the Date of Registration of Instruments of Sasine, of Resignation and Sasine, and of Cognition and Sasine, according to the existing Law and Practice; and Extracts of all such Conveyances, Warrants of Registration, Instruments of Cognition, and other Notarial Instruments so recorded, shall make Faith in all Cases as the recorded Conveyances, Warrants, and Instruments themselves would have done, except where any such Conveyance, Warrant, or Instrument so recorded shall be offered to be improved.

Present  
Forms of  
Convey-  
ances may  
be used.

XIV. Nothing contained in this Act shall prevent the Constitution, Transmission, or Completion of Rights to Lands held Burgage by the Forms in use prior to the passing of this Act.

Mode of  
completing  
Title by a  
Trustee in  
Sequestra-  
tion, and  
by Liqui-  
dators of  
Joint  
Stock  
Compa-  
nies.

XV. It shall be competent to a Trustee on a sequestrated Estate, or to Liquidators, official or voluntary, appointed for the Purpose of winding up a Joint Stock Company, who shall desire to complete a Title to any Lands held Burgage, to expedite, in the Manner aforesaid, a Notarial Instrument setting forth the Act and Warrant of Confirmation in favour of such Trustee, or the Appointment of such Liquidators, official or voluntary, respectively, and specifying the Lands belonging to the Bankrupt or Company to which a Title is to be completed, and the Title by which such Lands are held by the Bankrupt or Company, in or as nearly as may be in the Form of Schedule (L.) to this Act annexed, and to record such Notarial Instrument in the appropriate Register of Sasines; and such Notarial Instrument being so recorded shall be equivalent to an Instrument of Sasine or of Resignation and Sasine in favour of the Trustee or Liquidators, duly expedite and recorded, following on a Con-

veyance by the Bankrupt or Company, and Resignation of the Lands in due Form; and when Heritable Securities are contained in such Notarial Instrument, the Instrument when recorded in the appropriate Register of Sasines shall, along with its Warrants, be equivalent to an Assignment of such Heritable Securities granted in favour of such Trustee by the Bankrupt, or in favour of such Liquidators by the Company, and duly recorded in the said Register.

XVI. In Actions of Constitution and Adjudication against an Apparent Heir on account of his Ancestor's Debt or Obligation, for the Purpose of attaching Lands held Burgage, forming Part of the Ancestor's Heritable Estate, it shall not be necessary to raise separate Summonses of Constitution and Adjudication, but both Actions may be combined in One Summons, whether the Heir renounce the Succession or not; and Actions of Constitution, and Actions of Constitution and Adjudication, against an Apparent Heir, on account of his Ancestor's Debt or Obligation, for the Purpose of attaching the Ancestor's Heritable Estate, and Actions of Adjudication against such Heir on account of his own Debt or Obligation for the Purpose of attaching such Estate, may be insisted in at any Time after the Lapse of Six Months from the Date of his becoming Apparent Heir, any Law or Practice to the contrary notwithstanding; and in all such Cases a Decree of Adjudication shall be held equivalent to a Conveyance from such Ancestor of all Lands adjudged in favour of the Adjudger.

XVII. When any Obligation, Burden, Condition, Qualification, or other Matter has been or shall be appointed to be inserted or referred to in the Instruments of Sasine, or of Resignation and Sasine, or of Cognition and Sasine, applicable to any Lands held Burgage, the same shall be inserted or referred to in any Instrument of Cognition or other Notarial Instrument applicable to such Lands to be expedite in virtue of this Act.

XVIII. In case of any Error or Defect in any Notarial Instrument expedite or to be expedite in virtue of the Act of the Eighth and Ninth Years of the Reign of Her present Majesty, Chapter Thirty-one, or in the recording of any such Instrument, or of any Error or Defect in any Instrument of Cognition, or other Notarial Instrument, to be expedite in virtue of this Act, or in the recording of any such Instrument, or in the recording of any Conveyance or Warrant of Registration, to be recorded in the Register of Sasines in virtue of this Act, it shall be competent of new to make and record a Notarial Instrument, or of new to record the Conveyance with the original, or a new Warrant of Registration, as the Case may require; and such new

Diligence  
against  
Apparent  
Heirs.

Obligations appointed to be inserted in Instruments of Sasine, &c. shall be inserted in Notarial Instruments.

Power to record Conveyance or Instrument of new with original or new Warrant of Registration.

Notarial Instrument so expedite and recorded, or such Conveyance so of new recorded with the original, or new Warrant of Registration, shall, from the Date of recording thereof, have the same Effect as if no previous Notarial Instrument had been expedite or recorded, or as if such Conveyance and original Warrant of Registration had not been previously recorded.

Recorded Instruments not to be challenged on the ground of Erasures.

XIX. The Act of the Sixth and Seventh Years of the Reign of His late Majesty King *William* the Fourth, Chapter Thirty-three, intituled *An Act to amend and regulate the Law of Scotland as to Erasures in Instruments of Sasine and of Resignation* ad remanentiam, shall extend and be applicable to Instruments of Cognition and Notarial Instruments authorized by this Act, and to Notarial Instruments expedite and to be expedite under the Act Eighth and Ninth *Victoria*, Chapter Thirty-one.

Deeds and Instruments may be partly written and partly printed or engraved.

XX. All Deeds, Writs, and Instruments whatever, mentioned or not mentioned in this Act, having a Testing Clause, may be partly written and partly printed or engraved: Provided that in the Testing Clause, the Date, if any, and the Names and Designations of the Witnesses, and the Number of the Pages of the Deed, Writ, or Instrument, if the Number be specified, and the Name and Designation of the Writer of the written Portions of the Body of the Deed, Writ, or Instrument, and of the written Portions of the Testing Clause, shall be expressed at length in Writing; and such Deeds, Writs, and Instruments shall be as valid and effectual as if they had been wholly in Writing.

Fees of existing Town Clerks reserved; but no future Town Clerks to have Claims for Compensation for Loss of Fees, &c.

XXI. No Town Clerk of any Royal or other Burgh in *Scotland* who has been or shall be appointed subsequent to the Eighth Day of *March* One thousand eight hundred and sixty shall have any exclusive Right or Privilege of preparing or expediting any Conveyance, Instrument, or other Writ applicable to Land, or shall have any Right to Compensation in respect of any Alterations affecting the Rights, Duties, or Emoluments of Town Clerks, which may be made by this Act or any Act which may hereafter be passed: Provided always, that existing Town Clerks, whether sole or joint, who, according to the present Law and Practice, are exclusively entitled to prepare Instruments of Sasine or of Resignation and Sasine in Burgage Subjects, shall, each during the Period to which his Rights shall extend under any legal Appointment or Agreement existing at the fore-said Date, but no longer, be entitled to claim and receive from the Person presenting for Registration in the Burgh Register of Sasines kept by such Town Clerk any Conveyance, which, when recorded, will operate the Effect of a

recorded Instrument of Sasine, or of Resignation and Sasine, such, but no other, Fees as he would have had Right to draw, and to appropriate to his own Use and Benefit, in respect of the Preparation and recording of the Instrument of Sasine or of Resignation and Sasine which, if this Act had not been passed, must have been recorded in the Burgh Register of Sasines, in order to operate the like Effect as the recording therein of such Conveyance; and the Person recording such Conveyance in the said Register of Sasines shall be bound to pay such, but no other, Fees to such Town Clerk in respect thereof: Provided always, that in estimating the said Fees such Instruments of Sasine or of Resignation and Sasine shall not be computed as of greater Length than the Writings actually recorded whereby such Instruments of Sasine or of Resignation and Sasine have been rendered unnecessary.

XXII. From and after the passing of this Act, and during the Period to which the Rights of any existing Town Clerk in any Burgh in which Lands are held Burgage, and no Register of Sasines is kept, extend under legal Appointment, and no longer, no Conveyance, Writ, or Instrument applicable to Lands in such Burgh held Burgage, and which under the Provisions of this Act shall come in place of any Writ or Instrument which such Town Clerk would by Law have been exclusively entitled to prepare had this Act not been passed, shall, as regards such Lands, be validly recorded in any Register of Sasines, unless the Warrant of Registration of such Conveyance, Writ, or Instrument shall be subscribed, or where no such Warrant is required, such Conveyance, Writ, or Instrument itself shall be subscribed or endorsed with the Signature of such Town Clerk, which Signature he shall be bound to attach or endorse on Receipt in respect thereof of One Half of the Fees which would have been chargeable by him for the Preparation of the Writ or Instrument which he would have been entitled to prepare as aforesaid, and of no other Fees; but if the said Conveyance, Writ, or Instrument be prepared by him, he shall not be entitled, in respect of his Signature as aforesaid, to any other beyond the ordinary Fees for preparing such Conveyance, Writ, or Instrument: Provided always, that in estimating the said Fees the said Writ or Instrument shall not be computed as of any greater Length than the Conveyance, Writ, or Instrument signed by such Town Clerk.

XXIII. All the Provisions of this Act applicable to Lands held by the ordinary Burgage Tenure shall be applicable also to Lands in the Burgh of *Paisley* held by the peculiar Tenure of Booking; and all the Provisions of this

Provision  
for Lands  
held Bur-  
gage where  
no Burgh  
Register  
of Sasines  
is kept.

Provision  
for Lands  
in the  
Burgh of  
*Paisley*

held by  
Booking  
Tenure.

Act applicable to Resignation, and to Instruments of Sasine, and of Resignation and Sasine, and of Cognition and Sasine, and Registers of Sasines, respectively, of Lands held Burgage shall be applicable also to Booking, and to Instruments of Resignation and Booking, and to Extract Bookings, and to the Register of Booking, respectively, of Lands in said Burgh of *Paisley* held by said Tenure of Booking: Provided always, that nothing in this Act contained shall prevent the Constitution, Transmission, or Completion of Rights to Lands held by the said Tenure of Booking by the Forms in use prior to the passing of this Act.

Court of  
Session  
may fix  
and regu-  
late Fees.

XXIV. It shall be lawful for the Court of Session from Time to Time to pass Acts of Sederunt fixing and regulating the Fees payable to Town Clerks and Keepers of Registers of Sasines for and with respect to all Instruments and Proceedings under this Act, and the recording of all Deeds and Instruments made and executed under the Provisions thereof; and the said Court may either make a general Table of Fees which shall be applicable to all the Burghs in *Scotland*, or may make special Tables of Fees which shall be applicable to any One or more of such Burghs, as they think fit; and the Tables of Fees applicable to each Burgh shall come into operation on the Death, Resignation, or Removal of the existing Town Clerk of such Burgh; and it shall not be lawful for any Town Clerk or the Keeper of the Register of Sasines of any Burgh who shall be appointed after the passing of this Act, to demand or receive any higher Fees for or in respect of any Instruments or Proceedings under this Act, or the recording of any Deeds or Instruments made and executed under the Provisions thereof, than the Fees specified in the Table which for the Time shall be applicable to such Burgh; and the said Court may meet for the Purpose of passing and pass such Acts of Sederunt either during Session or Vacation, and may from Time to Time repeal or alter such Acts and Tables of Fees: Provided, that all Acts of Sederunt passed under the Authority of this Act shall, within One Month after the Date thereof, be transmitted by the Lord President of the said Court to One of Her Majesty's Principal Secretaries of State, that the same may be laid before both Houses of Parliament.

Clauses of  
Direction  
to be re-  
ferred to in  
Warrants  
of Regis-  
tration.

XXV. Every Deed containing a Clause of Direction in Terms of the recited Act or this Act, presented for Registration in any Register of Sasines, shall, if such Clause of Direction is intended to be acted on, bear express Reference thereto in the Warrant of Registration, if any, which, in Terms of the recited Act or this Act, is otherwise required to be endorsed on such Deed, or in a separate Warrant of Registration, in the Form as nearly as may be of the Sche-

dule (K.) to this Act annexed ; and in the Absence of such express Reference in such Warrant of Registration as aforesaid, such Deed shall be engrossed in the Register as if it had contained no Clause of Direction.

XXVI. It shall be competent for the Town Clerk of any Burgh to expedite and record, and for the Keeper of any Burgh or other Register of Sasines, Reversions, &c., to record, any Instrument of Sasine or of Cognition and Sasine, or any Notarial Instrument, or Conveyance or other Writ, in which such Town Clerk or Keeper may be personally interested, either individually or as Trustee for another or otherwise ; and no Instrument of Sasine or of Cognition and Sasine, Notarial Instrument, Conveyance, or other Writ, expedite or recorded prior to the Date of the passing of this Act, or which may hereafter be expedite or recorded, shall be challengeable or in any way affected by reason of personal Interest in the Town Clerk or Keeper of the Register by whom the same has been expedite or recorded as aforesaid : Provided, that this Enactment shall not prejudice or affect any Action or Proceeding which may have been instituted prior to the passing of this Act.

XXVII. In Excambions of entailed Lands, whether held Burgage or not, it shall not be necessary to insert at Length in the Conveyances of the Lands obtained in exchange for such entailed Lands, or in the Instruments of Sasine, Notarial Instruments, or other Writs, which may follow upon such Conveyances, the Destination of Heirs, or the Conditions, Prohibitions, Declarations, Limitations, Restrictions, Clauses irritant and resolute, or Clauses authorizing Registration in the Register of Tailzies, contained in such Deed of Entail, but in such Conveyances, and in all other Conveyances of entailed Lands, and in all Notarial Instruments applicable thereto, it shall be competent and sufficient to refer to such Destination, and to such Conditions, Prohibitions, Declarations, Limitations, Restrictions, Clauses irritant and resolute, and Clause authorizing Registration in the Register of Tailzies, as set forth in the Deed of Entail recorded in the Register of Tailzies, if the same shall have been so recorded, or as set forth in any Conveyance, Instrument of Sasine, or other Writ duly recorded in the appropriate Register of Sasines, and forming Part of the Progress of Title Deeds following on such Deed of Entail, such Reference being made as nearly as may be in the Terms set forth in Schedule (L.) to this Act annexed ; and the Reference so made to such Destination, and to such Conditions, Prohibitions, Declarations, Limitations, Restrictions, Clauses irritant and resolute, and Clause authorizing

Official  
Acts of  
Town  
Clerks and  
Keepers of  
Registers  
of Sasines  
not to be  
affected by  
their per-  
sonal In-  
terest in  
recorded  
Writs.

Conditions  
of Entail,  
&c. may,  
in Exam-  
bions of  
entailed  
Lands, be  
inserted by  
Reference  
merely.



Registration in the Register of Tailzies, shall be equivalent to the full Insertion thereof, notwithstanding any Law or Practice to the contrary or any Injunction to the contrary contained in such Deed of Entail, or any Enactments or Provisions to the contrary contained in any Act of Parliament, all which are hereby repealed to the Extent of making this Enactment operative, but no further.

Debts affecting Lands exchanged for other Lands to affect such other Lands in lieu thereof.

XXVIII. When any Lands, whether held Burgage or not, disposed, under the Authority of an Act of Parliament, in Excambion for other Lands, are burdened with Debts, the Lands so disposed shall, from and after the Date of Registration in the appropriate Register of Sasines of the Contract or Deed of Excambion of such Lands, be freed and disburdened of such Debts so far as previously affecting the same, and shall be burdened with the Debts, if any, which previously affected the Lands acquired in exchange for the same, in the Order of Preference in which such Debts were a Burden upon such last-mentioned Lands: Provided always, that before any such Excambion is authorized (in addition to such Procedure as may be prescribed by such Act) such Intimation as the Court of Session may consider necessary shall be made to all Creditors having Interest, and such Creditors shall be entitled to state any Objections thereto, of which the Court shall judge: Provided also, that in such Contract or Deed of Excambion, or in a Schedule subscribed as relative thereto, and declared to be Part thereof, and recorded therewith, there shall be set forth as to each of the said Debts the following Particulars; namely, the Amount of the Debt, the Date of recording the Writ by which its Constitution was originally published, the Register in which the same was so published, the Name and Designation of the original Creditor, and if the Debt has been transferred the Name and Designation of the Creditor understood to be in Right thereof for the Time, and the Date of recording the Writ whereby his Right was published, and the Register in which the same was so published; provided further, that in such Contract or Deed of Excambion such Debts shall be expressly declared to burden the Lands to which the same are transferred as aforesaid.

Entailer's Debts, &c. may be charged on entailed Estate by Bond and Disposition in Security.

XXIX. In all Cases where there are or shall be Entailer's or other Debts or Sums of Money which might lawfully be made chargeable, by Adjudication or otherwise, upon the Fee of an entailed Estate, the Heir of Entail in possession of such Estate for the Time being shall have all the like Powers of charging the Fee and Rents of such Estate, or any Portion thereof, other than the Mansion House, Offices, and Policies thereof, with such Debts or

Sums of Money, and of granting, with the Authority of the Court of Session, Bonds and Dispositions in Security for the Amount of such Debts and Sums of Money, as by the Act Eleventh and Twelfth *Victoria*, Chapter Thirty-six, and the Act Sixteenth and Seventeenth *Victoria*, Chapter Ninety-four, are conferred with reference to Provisions to younger Children; and such Bonds and Dispositions in Security may be granted in favour of any Parties in the Right of such Debts or Sums of Money at the Date when such Bonds and Dispositions in Security are executed.

XXX. The Short Clauses of Consent to Registration Short for Preservation, and for Preservation and Execution, set forth in the Schedule (A.) annexed to the Act Tenth and Eleventh *Victoria*, Chapter Forty-eight, shall, when occurring in any Deed or Writing whatever, have the like Meaning and Import as by the said Act is attributed to them when occurring in any Disposition, Conveyance, Deed, or Instrument referred to in the First Section of the said Act.

XXXI. With reference to the First Section of the "Titles to Land (*Scotland*) Act, 1858," it is declared and enacted, that in all and each of the Cases set forth in the Sixth Section of the Act Tenth and Eleventh *Victoria*, Chapter Forty-seven, or in the Fifth Section of the Act Tenth and Eleventh *Victoria*, Chapter Forty-eight, or in the Fourth Section of the Act Tenth and Eleventh *Victoria*, Chapter Forty-nine, or in the Fourth Section of the Act Tenth and Eleventh *Victoria*, Chapter Fifty, or in the Twenty-seventh Section of the Act Tenth and Eleventh *Victoria*, Chapter Fifty-one, it is and shall be lawful to refer, as in the said Acts of the Tenth and Eleventh *Victoria* is provided, to such real Burdens or Conditions or Limitations as are therein specified, as set forth at full Length in any Conveyance or Notarial Instrument recorded in the appropriate Register of Sasines of the Lands to which such Burdens or Conditions or Limitations apply; and that such Reference is and shall be equivalent to the full Insertion in the Disposition, Conveyance, Procuratory, Charter, Precept of Clare constat, Decree of Adjudication, Instrument of Sasine, or other Deed or Instrument in which such Reference occurs of such real Burdens or Conditions or Limitations, and has and shall have all the legal Effects assigned by the said Provisions of the said Statutes, or any or either of them, to any Reference to such real Burdens or Conditions or Limitations, as set forth at Length in any recorded Instrument of Sasine, or recorded Instrument of Resignation *ad remanentiam*.

XXXII. The Provisions of the Act of the Thirteenth Extension

of Provi-  
sions of 13  
& 14 Vict.,  
c. 13, to  
Trusts for  
the Main-  
tenance of  
Churches,  
Schools,  
&c.

*Year of Victoria, Chapter Thirteen, intituled An Act to render more simple and effectual the Titles by which Congregations or Societies associated for Purposes of Religious Worship or Education in Scotland hold real Property required for such Purposes,* shall apply to all Trusts for the Maintenance, Support, or Endowment of Ministers of Religion, Missionaries, or Schoolmasters, or for the Maintenance of the Fabric of Churches, Chapels, Meeting Houses, or other Places of Worship, or of Mansees or Dwelling Houses or Offices for Ministers of the Gospel, or of Schoolhouses, or Schoolmasters Houses, or other like Buildings; and shall also apply to Feu Duties and other Heritable Property as well as to Lands and Houses and Money invested on Heritable Security; and it is hereby declared and enacted, that the Societies or Bodies of Men specified in the said Act include and shall be deemed to include the General Assemblies, Synods, and Presbyteries of the Established Church of *Scotland*, and of all other Presbyterian Churches in *Scotland*.

Recording  
Deed with  
Writ of  
Resigna-  
tion there-  
on not to  
operate  
Sasine on  
such Deed.

XXXIII. The last Proviso to the Ninth Section of the "Titles to Land (*Scotland*) Act, 1858," expressed in the following Terms, *viz.*, "Provided always, that the recording of such Deed along with such Writ shall have the Effect of an Instrument of Sasine following on such Deed," is hereby repealed; and in lieu thereof, when a Deed which is the Warrant for Resignation, with a Writ of Resignation written thereon, has been or shall be recorded in the appropriate Register of Sasines, the recording of such Deed along with such Writ shall not have the Effect of an Instrument of Sasine following on such Deed.

Descrip-  
tion of  
Lands con-  
tained in  
recorded  
Deeds may  
be inserted  
in subse-  
quent  
Writs by  
Reference  
merely.

XXXIV. The Fifteenth Section of the recited Act is hereby repealed; and in lieu thereof be it enacted, That where any Lands held or not held Burgage have been particularly described in any prior Conveyance, Discharge, or other Deed or Instrument duly recorded in the appropriate Register of Sasines, it shall not be necessary in any subsequent Conveyance, Discharge, or other Deed or Instrument containing or referring to the whole or any Part of such Lands, to repeat the particular Description of the Lands at Length, but it shall be sufficient to specify the Name of the County, and, where the Lands are held Burgage, the Name of the Burgh and County in which they are situated, and to refer to the particular Description contained in the prior Conveyance, Discharge, or other Deed or Instrument so recorded, in or as nearly as may be in the Manner set forth in No. 1. of Schedule (H.) to this Act annexed; and the Specification and Reference so made shall be held to be equivalent to the full Insertion of the particular Description

contained in such prior Conveyance, Discharge, or other Deed or Instrument so recorded, and shall have the same Effect as if the particular Description had been inserted exactly as it is set forth in such prior Conveyance, Discharge, or other Deed or Instrument.

XXXV. The Thirty-first Section of the "Titles to Land (Scotland) Act, 1858," is hereby repealed; and in lieu thereof be it enacted, That in Case of any Error or Defect in any Notarial Instrument expedite or to be expedite in Virtue of the said Act, or of the Act Eighth and Ninth Victoria, Chapter Thirty-one, or in the recording of any such Instrument, or of any Instrument of Resignation *ad remanentiam*, or in the recording of any Conveyance, or Procuratory of Resignation *ad remanentiam*, or Warrant of Registration, recorded or to be recorded in the Register of Sasines in virtue of the said Titles to Land Act, it shall be competent of new to make and record a Notarial Instrument, or Instrument of Resignation, or of new to record the Conveyance, or Procuratory of Resignation, with the original or a new Warrant of Registration, as the Case may require; and such new Notarial Instrument or Instrument of Resignation, so expedite and recorded, or such Conveyance or Procuratory of Resignation, so of new recorded, with the original or new Warrant of Registration, as the Case may require, shall, from the Date of recording thereof, have the same Effect as if no previous Notarial Instrument or Instrument of Resignation had been expedite or recorded, or as if such Conveyance, or Procuratory of Resignation, and original Warrant of Registration had not been previously recorded.

XXXVI. The Words "to be holden in the same Manner in which the Granter of the Conveyance held or might have held the same," in the Fifth Section of the "Titles to Land (Scotland) Act, 1858," and the Words of the same or similar Import in the Twelfth, Twenty-first, Twenty-second, and Twenty-seventh Sections of the said Act relative to the Manner in which the Lands mentioned in the said Sections are to be held, are hereby declared and shall be construed to mean that the Lands are to be held *a me vel de me*, where the Investiture of Lands contains no Prohibition against Subinfeudation or against an alternative Holding, and *a me* only where the Investiture contains such Prohibition: Provided always, that where the Investiture contains such Prohibition, the Conveyance or Instrument shall, if an Entry in the Lands therein specified or thereby conveyed be expedite with the Superior within Twelve Months from the Date of such Conveyance or Instrument, have the same Preference in all respects from the Date of recording in

Conveyances and Instruments may be recorded of new.

Meaning of certain Words in Titles to Land Act, 1858, declared.

the appropriate Register of Sasines the Conveyance or Instrument, as if the same contained an *a me vel de me* Holding, and the Investiture did not contain any Prohibition against Subinfeudation or against an alternative Holding.

Amend-  
ment of  
Sect. 33  
of "Titles  
to Land  
(Scotland)  
Act, 1858."  
Mode of  
completing  
Title by a  
Judicial  
Factor on  
a Trust  
Estate, &c.

XXXVII. The Thirty-third Section of the Titles to Land (*Scotland*) Act, 1858, shall be read and construed as if the Word "Resignation" were substituted for the Word "Registration" occurring in the said Section.

XXXVIII. Where a Judicial Factor shall apply by Petition for Authority to complete a Title to any Lands held or not held Burgage forming Part of the Estate under his Management, and where the Petition shall specify the Lands to which such Title is to be completed, the Warrant granted for completing such Title shall also specify the Lands to which such Title is to be completed, and such Warrant shall be held to be a Disposition of the Lands, and an Assignment of any Heritable Securities contained in such Warrant in due and usual Form, in favour of such Judicial Factor by the Person, whether in Life or deceased, whose Estate is under judicial Management, and, where such Judicial Factor has been appointed on a Trust Estate which shall have been vested in a Trustee or former Judicial Factor by such Trustee or former Factor, whether in Life or deceased, for the Purposes of such Trust: Provided always, that for enabling the Person in whom such Lands were last vested, or his Representatives, or other Parties interested, to bring forward competent Objections against such Warrant being granted, or Claims upon the Estate, the Court shall order such Intimation and Service of the Petition as to them shall seem proper.

All Char-  
ters or  
Writs of  
Resigna-  
tion to  
operate  
Confirma-  
tion.

XXXIX. Charters of Resignation or Adjudication or Sale shall operate as a Confirmation of the whole Deeds and Instruments necessary to be confirmed in order to complete the Investiture of the Party in whose Favour such Charter may be or may have been granted.

Writs of  
Confirmation,  
&c.,  
by Sub-  
jects Supe-  
riors to be  
tested.

XL. Writs of Confirmation and Writs of Resignation and Writs of Clare constat granted in Terms of the Titles to Land (*Scotland*) Act, 1858, by Subjects Superiors, shall be authenticated in the Form required by the Law of *Scotland* in the Case of ordinary Deeds.

Stamp  
Duty on  
Writs of  
Confirma-  
tion, &c.

XLI. The Stamp Duty chargeable on Writs of Confirmation, Writs of Resignation, Writs of Clare constat, and Writs of Investiture, granted or to be granted in virtue of the said Act, and on Writs of Acknowledgment under "The Registration of Leases (*Scotland*) Act," shall be the same as that now chargeable on Charters of Confirmation, Charters of Resignation, and Precepts of Clare constat.

Applica-

XLII. The Fees to be drawn from and after the passing

of this Act in the Office of the Register of Deeds, Probative Writs, and Protests shall be applied in the first Instance to Payment of the Principal Keeper to the Extent of a Sum of Five hundred Pounds annually, and of each of the Two Assistant Keepers to the Extent of Three hundred and fifty Pounds annually, and any Surplus of the said Fees shall be disposed of according to the existing Law and Practice.

XLIII. This Act shall take Effect from and after the First Day of *October* One thousand eight hundred and sixty.

tion of  
Fees.

Com-  
mence-  
ment of  
Act.

## SCHEDULES referred to in the foregoing Act.

### SCHEDULE (A.)

#### No. 1.

*Warrant of Registration to be written on a Conveyance when presented without Assignment apart or Notarial Instrument.*

REGISTER on behalf of *A. B. (insert Designation)* [or Register, &c., along with Assignment (or Assignations) hereon] (*or otherwise, as the Case may be*).

(Signed) *A. B.*

[*or*]  
[*or, as the Case may be,*] *C. D., W. S., Edinburgh.*  
Agent of the  
said *A. B.*

#### No. 2.

*Warrant of Registration to be written on a Conveyance when presented with Assignment apart or Notarial Instrument.*

REGISTER on behalf of *A. B. (insert Designation)* along with the Assignment [or Assignations or Notarial Instrument] docqueted with reference hereto (*or otherwise, as the Case may be*).

(Signed) *A. B.*

[*or*]  
[*or, as the Case may be,*] *C. D., W. S., Edinburgh,*  
Agent of the  
said *A. B.*

### SCHEDULE (B.)

*Notarial Instrument in favour of Disponee or his Assignee, &c.*

AT there was by [or on  
behalf] of *A. B. of Z. Esquire,* presented to me, Notary

Public subscribing, a Disposition [or other Deed; or an Extract of a Deed, as the Case may be], granted by C.D. of Y. Esquire, and bearing Date [insert the Date], by which Disposition the said C.D. sold, alienated, and disposed to the said A.B. [or gave, granted, and disposed, or otherwise, as the Case may be, to the said A.B.] [or to E.F.], and his Heirs and Assignees [insert the Destination, if any, so far as may be necessary], heritably and irredeemably [or redeemably, or in Liferent, or otherwise, as the Case may be,] all and whole [insert the Description of the Subjects conveyed; and if the Deed be granted under the Burden of a Real Lien or Servitude, or any other Incumbrance, Condition, or Qualification of the Right, or under Redemption, add here], but always under the Burden of a Real Lien, &c. [as the Case may be]. [If the Person expeding the Instrument be other than the original Disponee, add], As also there was presented to me [here specify the Title or Series of Titles by which such Person acquired Right, and the Nature and Extent of his Right]. Whereupon this Instrument is taken in my Hands, in Terms of the Titles to Land (Scotland) Act, 1860. In witness whereof [insert a Testing Clause, as in Instrument of Resignation and Sasine authorized by the Act 10 & 11 Vict., Cap. 49].

(Signed) G.H.  
Notary Public.

I.K., Witness.  
L.M., Witness.

### SCHEDULE (C.)

*Clause of Direction specifying Part of Deed which Granter desires to be recorded.*

AND I direct to be recorded in the Register of Sasines the Part of this Deed from its Commencement to the Words (insert Words) on the Line of the Page [and also the Part from the Words (insert Words) on the Line of the Page to the Words (insert Words) on the Line of the Page] [or I direct the Whole of this Deed to be recorded in the Register of Sasines with the Exception of the Part] [or Parts, as the Case may be, specifying the Part or Parts excepted, as above.]

### SCHEDULE (D.)

*Writ of Clare constat in Burgage Subjects.*

WE [specify Granters]. Whereas it clearly appears that C.D. [insert Name and Designation of the Ancestor] died last

vest and seised in [*describe Lands; and then insert any necessary Clauses as in Writs of Clare constat applicable to feudal Property*]; and that conform to Instrument of Cognition and Sasine [*or as the Case may be*] in favour of the said C.D., recorded in the Register of Sasines of [*insert the Title of the Register*], the                      Day of                      in the Year                      . And that A.B. [*insert Name and Designation of Heir*] is eldest Son and nearest and lawful Heir of the said C.D. [*or as the Case may be.*] Therefore we hereby declare the said A.B. to have Right to the said Lands as Heir foressaid. In witness whereof [*to be tested and signed in common Form*].

## SCHEDULE (E.)

*Notarial Instrument in favour of a general Donee, or his Assignee, &c.*

AT                      there was by [*or on behalf of*] A.B. of Z, presented to me, Notary Public subscribing, a Disposition [*or other Deed or Instrument*], recorded in the [*specify Register of Sasines and Date of recording*], by which recorded Disposition [*or other Deed or Instrument*] C.D. of Y, was vested in all and whole [*describe the Lands or other Subjects, as the Case may be*]; as also there was presented to me a general Disposition [*or other Deed, or an Extract of a Deed*], granted by the said C.D., and bearing Date [*insert Date*], by which general Disposition the said C.D. gave, granted, and disposed [*or otherwise, as the Case may be*], to the said A.B., and his Heirs and Assignees [*or otherwise, as the Case may be*], heritably and irredeemably [*or in Liferent, or otherwise, as the Case may be*], all and sundry the whole Heritable Estate of which he was [*or might die*] possessed. [*If the Deed be granted under any Real Burden, or Condition or Qualification, add here, but always under the Burden of the Real Lien, &c.; and if the Deed be granted in Trust, or for specific Purposes, add, but always in trust, or for the Uses and Purposes mentioned in said Deed. If the Person expeding the Instrument be other than the original Donee, add, as also there was presented to me (specify the Title or Series of Titles by which such Person acquired Right, and the Nature and Extent of his Right.)*] Whereupon, &c., as in Schedule (B.)



## SCHEDULE (F.)

## No. 1.

*Assignment of an unrecorded Conveyance.*

I, A.B., in consideration of, &c. [*or otherwise, as the Case may be*], hereby assign to C.D., and his Heirs and Assignees [*or otherwise, as the Case may be*], the Disposition [*or other Deed, specifying the Nature of the Deed*] granted by E.F., dated, &c., by which he conveyed the Lands of X, as therein described, to me [*or otherwise, as the Case may be, specifying the connecting Title, and the Nature and Extent of the Right conveyed. State the Term of the Assignee's Entry; and other Particulars, if any, ought to be specified.*] In witness whereof [*insert a Testing Clause in the usual Form.*]

## No. 2.

*Assignment of an unrecorded Conveyance written upon the Conveyance.*

I, A.B., in consideration of, &c. [*or otherwise, as the Case may be*], hereby assign to C.D., and his Heirs and Assignees [*or otherwise, as the Case may be*], the foregoing Disposition of the Lands of X, as therein described, granted in my Favour [*or otherwise, as the Case may be, specifying the connecting Title, and the Nature and Extent of the Right conveyed. State the Term of the Assignee's Entry; and other Particulars, if any, ought to be specified.*] In witness whereof [*insert a Testing Clause in the usual Form.*]

## SCHEDULE (G.)

*Notarial Instrument in favour of an Assignee to an unrecorded Conveyance to be recorded along with the Conveyance.*

At there was  
by [*or on behalf of*] A.B. of Z., presented to me, Notary Public subscribing, a Disposition [*or other Deed, as the Case may be, specifying the Nature of the Deed*], granted by C.D. of Y., and bearing Date [*insert Date*]; by which Disposition the said C.D. conveyed to E.F. the Lands of X., as therein described, and which Disposition is to be recorded along with this Instrument; as also there was presented to me [*specify the Title or Series of Titles by which A.B. ac-*

(Signed) *G.H.*,  
Notary Public.

***L.M., Witness.***

**No. 1.**

THE Lands [or Subjects] and others [or the Lands delineated and coloured on a Copy of the Ordnance Survey Map hereto annexed, and signed as relative hereto], [or the Lands of A. and others], [or the House No. 10, Street, and others,] [or other like short Description,] in the County of , [or in the Burgh of and County of as the Case may be], being the Lands [or Subjects] particularly described in the Disposition [or other Deed, as the Case may be], granted by C.D., and bearing Date [insert Date], and recorded in the [specify Register of Sasines] on the Day of in the Year [or as particularly described in the Instrument of Sasine or Notarial Instrument recorded; &c., or as the Case may be]. [If Part only of Lands is conveyed, describe such Part as above, and add, being Part of the Lands particularly described, &c.; or thus, being the Lands [or Subjects] as particularly described, &c., with the Exception of, and describe the Part excepted].

*Clause of Reference to Destinations in Entails.*

Day of \_\_\_\_\_ in the Year \_\_\_\_\_, and recorded  
in the Register of Tailzies on the \_\_\_\_\_ Day of  
in the Year \_\_\_\_\_, [or in the said Disposition and Deed  
of Entail dated and recorded as aforesaid, or in a Deed [or  
Instrument] recorded [specify \_\_\_\_\_ Register of Sasines] upon the  
Day of \_\_\_\_\_ in the Year \_\_\_\_\_].

## SCHEDULE (I.)

*Notarial Instrument in favour of a Trustee in a Sequestration,  
or of Liquidators of Joint Stock Companies.*

AT there was, by [or on behalf of] A.B., as Trustee on the sequestrated Estate of C.D., [or as Liquidator for winding up the [specify Name of Company], presented to me, Notary Public subscribing, a Disposition [or other Deed or Instrument] [insert Date] recorded in the [specify Register and Date of recording], by which [ &c., specify the Title or Series of Titles by which the Bankrupt held the Lands ]; as also there was presented to me an Extract Act and Warrant of Confirmation in favour of the said A.B., dated [insert Date] [or here specify the Appointment of the Liquidator or Liquidators, and the Date thereof]. Whereupon, &c., as in Schedule (B.)

## SCHEDULE (K.)

Register, in Terms of Clause of Direction, on behalf of A.B., [insert Designation, and, where necessary, add, along with Assignment hereon (or Assignations hereon) (or Writ of Resignation hereon) (or the Assignment or Assignations or Notarial Instrument docquetted with reference hereto) (or otherwise, as the Case may be)].

(Signed) A.B.

[or, C.D., W.S., Edinburgh,]

[or, as the Case may be] Agent of the said A.B.

## SCHEDULE (L.)

*Clause of Reference to Conditions of Entail, &c.*

[After the Description of the Lands insert] But always with and under the Conditions, Prohibitions, Declarations, Limitations, and Restrictions, and Clauses irritant and resolutive [or Clause authorizing Registration in the Register of Tailzies, as the Case may be], contained in a Disposition and Deed of Entail of the Lands of X. [specify leading Name merely], and others, executed by the deceased E.F., bearing Date the Day of in the Year and recorded in the Register of Tailzies on the Day of in the Year [or in the said Disposition and Deed of Entail dated and recorded as aforesaid] [or in (specify Writ) recorded in the General Register of Sasines (or as the Case may be) upon the Day of in the Year ].

CAP. CXLVI.

*An Act to amend the Act for regulating Measures used in Sales of Gas.*—[28th August 1860.]

WHEREAS Delays have occurred in preparing the Models of Measures, according to the Provisions of an Act passed in the last Session of Parliament, intituled *An Act for regulating Measures used in Sales of Gas*, and it is expedient to defer the Time when several of the Provisions of the said Act come into operation, and further to amend the same: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. Except as to things done before the passing of this Act under the Authority of the said Act, where in the said Act anything is required to be done within a specified Time after the passing of the same, such Time shall be calculated as if the Thirteenth Day of *October* One thousand eight hundred and sixty had been the Date of the passing of the said Act: Provided always, that, notwithstanding anything in the said Act contained, the said Act shall not come into operation in any County of *England* until the Magistrates of such County in Quarter Sessions, or in any County in *Scotland* until the Commissioners of Supply of such County, or in any County of *Ireland* until the Grand Jury of such County, shall have resolved to bring such County under the Operation of the Act.

II. This Act and the recited Act shall be construed together as One Act, and all Penalties and Forfeitures incurred under the Provisions of either Act shall be sued for and recoverable in all Counties, Ridings, or Divisions in *England* and *Ireland* before Two or more Justices of the Peace at Petty Sessions, or before the Mayor or other Chief Magistrate of any City, Borough, Town, or Place.

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